Supreme Court, U.S.
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In the Supreme Court of the United States

BAYOU FLEET, INC.

Petitioner

VERSUS

HOME PLACE BATTURE LEASING, INC., NEAL CLULEE, MARY CLULEE and N/C MATERIALS, INC.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Noerr-Pennington* immunity can be extended beyond Sherman Act antitrust claims to include civil rights claims under Section 1983?

2. Whether *Noerr-Pennington* immunity should protect a defendant in a Section 1983 case who retaliates against the plaintiff for exercising its First Amendment right to petition the courts?

3. Whether *Noerr-Pennington* immunity should protect a defendant involved in a Section 1983 civil rights conspiracy or joint participation scheme?

4. Whether a lawsuit can be dismissed on the basis of *Noerr-Pennington* immunity after a ruling is issued during trial prohibiting the defendants from amending their answer to allege it as an affirmative defense?

5. Whether a law clerk's improper participation in a non-jury trial creates an appearance of impropriety which deprives a litigant of meaningful access to the federal courts justifying a new trial?

6. Whether, after a trial, a partial consent judgment can be modified by the district court based upon the lack of consent of a party?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Petitioner, Bayou Fleet, Inc. It does not have a parent corporation, its stock is not publicly traded and there is no publicly held corporation owning any of its stock.

2. Respondent, Home Place Batture Leasing, Inc. It does not have a parent corporation, its stock is not publicly traded and there is no publicly held corporation owning any of its stock.

3. Respondent, N/C Materials, Inc. It does not have a parent corporation, its stock is not publicly traded and there is no publicly held corporation owning any of its stock.

4. Respondent, Neal Clulee.

5. Respondent, Mary Clulee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Bayou Fleet, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on November 28, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated November 28, 2000, is reprinted in the appendix. In addition, the following reported opinions were issued in the district court: 1) *Bayou Fleet v. Alexander*, 68 F.Supp.2d 734 (E.D. La. 1999); 2) *Bayou Fleet v. Alexander*, 26 F.Supp.2d 894 (E.D. La. 1998); and, 3) *Bayou Fleet v. Alexander*, 1997 WL 625492 (E.D. La. 1997). The first and third district court opinions are reprinted in the appendix.

JURISDICTION

The Court of Appeals' judgment was entered on November 28, 2000. Petitioner now invokes the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States of America provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Fed. R. Civ. Pro. 8(c) provides: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

STATEMENT OF THE CASE

On July 14, 1997, petitioner, Bayou Fleet, Inc. (hereinafter "Bayou Fleet"), filed a § 1983 lawsuit against respondents, Neal Clulee, Mary Clulee and their company,

Home Place Batture Leasing, Inc. (hereinafter "the Clulees"), and against Ellis Alexander, individually and in his official capacity as a council member of the St. Charles Parish Council. Subject matter jurisdiction in the trial court was based upon 28 U.S.C. § 1331 and § 1343. In general, the lawsuit alleged that the Clulees and Mr. Alexander conspired or jointly participated in a scheme to eliminate Bayou Fleet as a business competitor of the Clulees by baseless challenges to the non-conforming zoning status of Bayou Fleet's property and by attempting to prevent the issuance of permits to Bayou Fleet and its lessee, Ronald Adams Contractors, Inc. (hereinafter "Ronald Adams").[1]

On September 23, 1997, Bayou Fleet amended its lawsuit seeking injunctive and declaratory relief to prevent the enforcement of two unconstitutional acts of the St. Charles Parish Council (hereinafter "Parish Council") which were sponsored by Mr. Alexander. That legislation was introduced in retaliation against Bayou Fleet for its filing of this lawsuit and also to advance the object of the conspiracy to put Bayou Fleet out of business. The amended lawsuit also added St. Charles Parish (hereinafter "the Parish") as a defendant.[2]

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[1]For more detail on the facts, see the recitations of facts in the lower courts' decisions. Those decisions are contained in the Appendix (Appendix A-C).

[2]Bayou Fleet amended its lawsuit an additional time to add the Clulees' other company, N/C Materials, Inc., as a defendant when it discovered that they had involved it in the conspiracy. In this application, N/C Materials is a respondent and is included in the phrase "the Clulees."

One of the aforesaid unconstitutional acts was the Special Legal Counsel Resolution. It created a Special Legal Counsel that was charged to investigate the non-conforming zoning status and uses of Bayou Fleet's property. Mr. Alexander proposed that the Clulees' attorney, Joel T. Chaisson, become the Special Legal Counsel. The other unconstitutional act was the Levee Law Ordinance. That ordinance made it a criminal act for Bayou Fleet to cross the Mississippi River levee to access its property unless it had written permission from the Parish Council.

The district court scheduled a trial for September 30, 1997, to take up the merits of Bayou Fleet's request for a permanent injunction and declaratory judgment. The Clulees and their attorneys attended and participated in that trial. On October 7, 1997, the district court issued its decision and declared that both acts were unconstitutional.[3] In order to arrive at that decision, the district court ruled that Bayou Fleet's property had maintained its non-conforming zoning status which had grandfathered its use for sand pits, a ship yard and a rock yard. See, Appendix B.

In order to remedy the official conduct which had produced the aforesaid unconstitutional acts, Bayou Fleet and the Parish entered into a settlement agreement which was contingent upon the Parish Council's approval of a joint stipulation which recognized the three non-conforming

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[3]In so ruling, the district court held that the Special Legal Counsel Resolution "was proposed in retaliation for the filing of this suit, and with a bad faith intent to injure Bayou Fleet." See, Appendix B.

uses (sand pits, a ship yard and a rock yard) of Bayou Fleet's property and the entry of a partial consent judgment which incorporated the terms of that joint stipulation. A resolution seeking that approval was taken up by the Parish Council on January 19, 1999. The Parish Council voted 6-2 in favor of the resolution approving the settlement and the joint stipulation. On January 20, 1999, Bayou Fleet, the Parish and Mr. Alexander filed a joint motion for entry of the partial consent judgment. The district court granted that motion and entered the partial consent judgment.

The Clulees then filed a motion for new trial seeking to alter the partial consent judgment. Specifically, the Clulees asked the district court to eliminate from that judgment the Parish's legislatively approved stipulations recognizing the three non-conforming uses of Bayou Fleet's property. On February 11, 1999, the district court heard argument on the Clulees' motion. At the conclusion of the argument, the district court granted the motion and struck from the partial consent judgment the first seven stipulations, which included the Parish's official recognition of the three non-conforming uses of Bayou Fleet's property. The district court took that action even though it had previously ruled on the merits that Bayou Fleet's property had maintained its non-conforming zoning status.

At the conclusion of that hearing, the district court *sua sponte* ordered the parties to submit memoranda on whether the Clulees were entitled to a dismissal of Bayou Fleet's lawsuit on the basis of *Noerr-Pennington* immunity, even though they had not urged that defense in their answer or in a motion to dismiss or motion for summary judgment. The parties filed their memos and the case went to trial on February 22, 1999.

After the trial commenced, on February 25, 1999, the Clulees filed a motion to amend their answer to raise *Noerr-Pennington* immunity as an affirmative defense. On the final day of trial, the district court denied that motion stating that it was filed "way after" the deadline "without any explanation" for its "tardiness."

On February 18, 1999, four days before trial, the Clulees filed a motion for summary judgment which sought a dismissal of the lawsuit on the basis of *Noerr-Pennington* immunity. At the conclusion of the trial, the district court denied that motion from the bench. The law clerk then, in open court and on the record, countermanded that ruling stating that "the merits of the motion will be addressed in the opinion."

On September 30, 1999, the district court issued its decision on the merits. Even though the district court had ruled during trial that the Clulees were not entitled to amend their answer to raise *Noerr-Pennington* immunity as an affirmative defense, Bayou Fleet's § 1983 lawsuit was dismissed on the basis of that defense. See, Appendix C.

On October 25, 1999, within thirty days of the district court's judgment, Bayou Fleet filed its notice of appeal. Thus, Bayou Fleet's appeal was timely and the appellate court's exercise of jurisdiction pursuant to 28 U.S.C. § 1291 was proper.

On November 28, 2000, the appellate court issued its opinion. With regard to *Noerr-Pennington* immunity, the appellate court held that: (1) it is a proper defense in a § 1983 lawsuit; (2) it is a proper defense in a § 1983 lawsuit even though part of the claim involves retaliation against the plaintiff for its exercise of its First Amendment

right of access to the courts; (3) a conspiracy/joint participation exception to *Noerr-Pennington* immunity does not exist in a § 1983 conspiracy/joint participant lawsuit; and, (4) even though the district court denied the Clulees' motion for leave to amend their answer in the middle of trial to raise it as an affirmative defense, it was nevertheless permissible for the district court to dismiss Bayou Fleet's lawsuit based upon the *Noerr-Pennington* immunity defense. See, Appendix A.

Even though the appellate court found that the law clerk's participation in the non-jury trial was "unusual", "troubling" and "unfortunate", it refused to order a new trial. Finally, the appellate court refused to reverse the district court's modification of the partial consent judgment despite the fact that Bayou Fleet had raised that issue in its complaint and the lower court had ruled after a trial on the merits that Bayou Fleet's property had maintained its non-conforming zoning status. See, Appendix A.

REASONS FOR GRANTING THE WRIT

A. Introduction

Congress wisely enacted legislation to prevent antitrust conspiracies. This Court has generally upheld the validity of that legislation, but did create one exception known as *Noerr-Pennington* immunity which protects a citizen's First Amendment right to petition public officials, irrespective of the petitioner's anti-competitive intent. Without any guidance from this Court, some of the lower appellate courts, including the Fifth Circuit, have extended the *Noerr-Pennington* immunity defense to § 1983 civil rights actions. It has proved to be the proverbial round peg in a square hole - it simply does not fit.

At least when the appellate courts were extending *Noerr-Pennington* immunity to § 1983 civil rights cases they attempted to ameliorate much of the mischief by recognizing an exception in cases of illegal conspiracies, equating them to what was perceived to be a parallel conspiracy exception to *Noerr-Pennington* immunity in antitrust cases. However, this Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) found that there was no conspiracy exception to *Noerr-Pennington* immunity. The instant case is an example of the anomaly that has resulted.

The petitioner's First Amendment right of access to the courts has been trumped by the respondents' First Amendment right to petition the government. The import of the Fifth Circuit's decision in this case has enormous potential for harm, and undermines many decisions of this Court protecting § 1983 victims from illegal conspiracies between private citizens and public officials acting under color of state law. Writs should be granted to examine and correct this situation.

B. Argument

1. Whether *Noerr-Pennington* immunity can be extended beyond Sherman Act antitrust claims to include civil rights claims under Section 1983?

Beginning with *Eastern Rail. Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), this Court developed what has come to be known as the *Noerr-Pennington* immunity defense. The foundation of that immunity is that "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals

in seeking anticompetitive action from the government." *Omni Outdoor Advertising, Inc.*, 499 U.S. at 379-80, 111 S.Ct. at 1354. "[*Noerr-Pennington*] . . . rests ultimately upon a recognition that the antitrust laws, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 380.

Since the advent of the *Noerr-Pennington* immunity defense, lower federal courts have extended *Noerr-Pennington* immunity so far beyond its intended application in the field of antitrust law that it now immunizes § 1983 defendants for conduct involving their violations of a plaintiff's federal constitutional rights. See, e.g., *Boulware v. State of Nev., Dept. of Human Resources*, 960 F.2d 793, 800 (9th Cir. 1992); *Video Intern. Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988).

As the lower courts were tip-toeing into the quagmire of extending *Noerr-Pennington* immunity to § 1983 cases, they recognized that such an extension created serious problems. For example, in *Video Intern. Production, Inc., supra*, the court acknowledged that:

> The section 1983 claim presents more difficulty, although we ultimately arrive at the same result. The difficulty arises from the fact that section 1983 itself protects constitutional rights, so our reasoning must involve a more careful balancing of interests.

Id. at 1084. However, the court believed that it could handle the required "balancing of interests" with the availability of the conspiracy exception to *Noerr-Pennington* immunity.

> We think that if Noerr-Pennington is to have its intended effect at all, an analysis of whether the petitioner is a co-conspirator under section 1983 must parallel the co-conspirator exception with Noerr-Pennington.

Id. at 1084.

The problem is that after the lower courts got knee deep in the "quagmire", this Court eliminated that which gave them comfort in believing that they could balance the competing interests in a § 1983 case. See, *Omni Outdoor Advertising*, 499 U.S. at 382-84, 111 S.Ct. at 1355-56. The irony is that the Fifth Circuit, in rejecting the conspiracy exception in this case, did so on the basis that this Court has never recognized it. See, Appendix A. Of course not, because this Court has never recognized that *Noerr-Pennington* immunity was applicable in a § 1983 case to begin with.

In effect, the application of *Noerr-Pennington* in § 1983 cases, has elevated one citizen's federal constitutional rights (the right to petition the government) over that of another's (the right of access to the courts), which has its own basis in the First Amendment. If the law should hold that a constitutional right which one person might have must be preferred over that of another's, the law will have simply abdicated to whim and caprice. This cannot occur consistently with an expectation of preserving our individual freedoms.

This Court has never addressed the issue of whether *Noerr-Pennington* immunity is an available defense in a §

1983 case.[4] The time has come for that to occur. This issue cries out for review and the lower courts have acknowledged that they have received "scant guidance" from this Court. See, e.g, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000). Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

2. Whether *Noerr-Pennington* immunity should protect a defendant in a Section 1983 case who retaliates against the plaintiff for exercising its First Amendment right to petition the federal courts?

When the district court ruled that the Special Legal Resolution was unconstitutional, it also held that it "was proposed in retaliation for the filing of this suit, and with a bad faith intent to injure Bayou Fleet." See, Appendix B. In filing this lawsuit, Bayou Fleet engaged in a form of political expression entitled to First Amendment protection. *In re Primus*, 436 U.S. 412, 428, 98 S.Ct. 1893, 1902, 56 L.Ed.2d 417 (1978). This protection forbids the imposition of retaliatory sanctions designed to punish the legitimate exercise of First Amendment rights. *Perry v. Sinderman*, 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972).

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[4]Without directly holding that *Noerr-Pennington* immunity does not apply outside the field of antitrust law, in *Omni Outdoor Advertising*, this Court permitted a state law trade libel claim to go forward despite granting *Noerr-Pennington* immunity on the federal antitrust claim. *Omni Outdoor Advertising*, 499 U.S. at 384, 111 S.Ct. at 1356.

Bayou Fleet argued on appeal that even if *Noerr-Pennington* immunity applied on a § 1983 claim, nevertheless, it would not immunize the Clulees on the retaliatory sanctions which occurred following the filing of this lawsuit.[5] In rejecting that argument, the appellate court stated:

> Bayou Fleet claims that *Noerr-Pennington* cannot be used to illegally abridge the rights of other citizens. The Supreme Court has not established a separate exception to the *Noerr-Pennington* doctrine for retaliatory intent, and we decline to create a new exception here.

See, Appendix A.[6]

While this Court has never directly addressed that issue, it did hold in *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985), that:

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[5]In addition to the Special Legal Counsel resolution, Bayou Fleet also contended that the Levee Law Ordinance and tax audit were in retaliation against it for filing this lawsuit.

[6]As previously noted, the fallacy in the Fifth Circuit's reasoning is that this Court has never recognized *Noerr-Pennington* immunity as a defense in a § 1983 case. Obviously, it could not have created an exception to a rule it had never established.

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions. (citations omitted)

Id. at 472 U.S. 485, 105 S.Ct. 2791.

In essence, the appellate court's ruling below created an absolute immunity for the Clulees by elevating whatever First Amendment rights they might have had under the rubric of *Noerr-Pennington* over the clear First Amendment right of Bayou Fleet to file a lawsuit without the imposition of retaliatory sanctions. That result further underscores the impossibility of properly applying an immunity created for antitrust law to § 1983 litigation and the numerous constitutional issues which arise therein. Nevertheless, even if this Court concludes that the *Noerr-Pennington* immunity defense can be applied in a § 1983 case, it should not follow that it can trump the federal constitutional rights of the § 1983 victim. Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

3. Whether *Noerr-Pennington* immunity should protect a defendant involved in a Section 1983 civil rights conspiracy?

The appellate court held that a conspiracy exception to *Noerr-Pennington* immunity does not exist in a § 1983 case. The appellate court reached that conclusion by extending to this § 1983 case, this Court's opinion in *Omni Outdoor Advertising*, *supra*, wherein the conspiracy exception to *Noerr-Pennington* immunity was rejected. However, as previously noted that was only in the context of an antitrust case. *Omni Outdoor Advertising*, 499 U.S. at 382-84, 111 S.Ct. at 1355-56.

Section 1983 litigation requires a showing that the defendant acted under color of state law. A private party may be reached in a § 1983 case if the plaintiff is able to establish a conspiracy or joint action with the state or its agents. In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), this Court stated:

> As the Court of Appeals correctly understood our cases to hold, to act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions.

Id. at 449 U.S. 27-28, 101 S.Ct. at 186. See also, *Adickes v. S.H. Kress*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Eliminating the conspiracy exception to the *Noerr-Pennington* immunity defense in § 1983 litigation is tantamount to tacitly overruling the aforesaid under color of state law standard because it will narrow civil rights relief to direct state action only. Due to the very nature of the standard, which requires interaction between a state actor and a private person, it is not difficult to envision that in each conspiracy or joint action situation a private person would simply claim *Noerr-Pennington* immunity because his or her conduct involved some degree of speech. In effect, allowing the appellate court's decision to stand would promote civil rights conspiracies between a private person and a state actor because the private person would know that he or she could engage in a conspiracy or joint action without fear of liability if the secret agreement is ever discovered.[7]

Finally, permitting a conspiracy exception to *Noerr-Pennington* immunity in § 1983 litigation would promote the purposes of the statute. Section 1983 was designed as comprehensive, remedial legislation for the deprivation of federal constitutional and statutory rights. "For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury or oppression." *United States v. Classic*, 313 U.S. 299, 324, 61 S.Ct. 1031, 1042, 85 L.Ed. 1368 (1941). Therefore, petitioner

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[7]The state actor already has little, if any, fear of liability because of the wide range of available immunity defenses, including absolute immunity for local legislators. See, *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998).

respectfully submits that this Court should grant this writ application to examine this issue.

4. Whether a lawsuit can be dismissed on the basis of *Noerr-Pennington* immunity after a ruling is issued during trial prohibiting the defendants from amending their answer to allege it as an affirmative defense?

The Clulees did not assert the *Noerr-Pennington* immunity defense, or any other immunity defense, in their original answer or in their answers filed in response to Bayou Fleet's first and second supplemental and amending complaints. Likewise, they did not raise the *Noerr-Pennington* immunity defense in a motion to dismiss or motion for summary judgment filed as their first response to the original or amended complaints.

After the trial commenced, the Clulees filed a motion for leave to amend their answer to raise *Noerr-Pennington* as an affirmative defense. On the final day of trial, the district court ruled from the bench and denied that motion on the basis that it was filed "way after" the deadline for amending pleadings "without any explanation" for its "tardiness." Nevertheless, when the district court issued its opinion on the merits, it dismissed Bayou Fleet's lawsuit on the basis of the *Noerr-Pennington* immunity defense. The appellate court affirmed the district court's opinion on this issue. See, Appendix A.

In *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), this Court, citing Fed. R. Civ. Pro. 8(c), ruled that a § 1983 defendant has the burden of pleading his or her qualified immunity defense. *Id.* at 446 U.S. 640, 100 S.Ct. 1924. See also, *Harlow v. Fitzgerald*,

457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), this Court ruled that if a defendant fails to plead an affirmative defense as required by Rule 8(c), then it is waived unless the district court permits an amendment of the answer. *Id.* at 401 U.S. 329-334, 91 S.Ct. 801-803.

The district court ruled during trial that the Clulees could not amend their answer to raise the *Noerr-Pennington* immunity defense, but it then dismissed Bayou Fleet's lawsuit on that basis. If Rule 8(c) is to have any meaning, it should stand for the proposition that when a district court denies a party leave to amend its pleadings to raise an affirmative defense, it cannot then decide the case on the basis of the defense which it did not allow. Otherwise, the appellate court's decision permitting that outcome is tantamount to a sanctioning of the judicial erasure of that rule from the Federal Rules of Civil Procedure. Therefore, petitioner respectfully submits that this Court should grant this writ application on this issue and summarily reverse the appellate court's decision holding that the *Noerr-Pennington* immunity defense was not waived.[8]

---

[8]Because the Fifth Circuit ruled that the Clulees were entitled to a dismissal of Bayou Fleet's lawsuit on the basis of *Noerr-Pennington*, it did not rule on the other issues which Bayou Fleet raised pertaining to the proof of the civil rights conspiracy/joint participation scheme. Bayou Fleet submits that if this Court rules in its favor and finds that *Noerr-Pennington* immunity is not applicable or available as a defense, then it should remand the matter to the appellate court for further proceedings to address and rule on those undecided issues.

5. Whether a law clerk's improper participation in a non-jury trial creates an appearance of impropriety which deprives a litigant of meaningful access to the federal courts justifying a new trial?

While Bayou Fleet believes that the *Noerr-Pennington* immunity issues are the primary reasons that writs should be granted, there was a serious breach in the district court that also justifies this Court's attention. On appeal, Bayou Fleet argued that it was entitled to a new trial because of conduct of the district court's law clerk during the non-jury trial which created plain error that was so substantial it deprived Bayou Fleet of meaningful access to the courts. The appellate court rejected that argument despite finding that the law clerk's participation in the non-jury trial was "unusual", "troubling", and "unfortunate." See, Appendix A.

While Bayou Fleet is a closely held family corporation its president and major shareholder, Robin Durant, was present throughout the trial in the district court as the company representative. He was astonished to see the law clerk, in effect, presiding at the trial. She directed the district court judge on when to proceed, how to proceed and even countermanded one of his rulings. Much of the conduct was subtle and does not appear in the record. However, there was a sufficient portion of it that was of record to constitute plain error that should have required a reversal by the appellate court.

For instance, at the beginning of the trial the following colloquy occurred:

(Defense Attorney) . . . you had requested that we submit a memorandum regarding the Noerr-Pennington doctrine, which we both submitted in that regards. Did the court feel it appropriate to address that issue, or do you just want to proceed?

(Court) I want to go ahead and proceed and I'll let you know something on that by 1:30 today.

(Defense Attorney) Thank you, Your Honor.

(Law Clerk) Judge, there is no way we can rule on it by 1:30 today because I am sitting in the courtroom right now.

(Court) It will have to be later.

The client was amazed, believing that in a bench trial a judge listened to the testimony and a law clerk worked in chambers researching pending legal issues in the trial. Instead, the law clerk in this case could not research a pending legal issue (*Noerr-Pennington*) which, if correctly found to be in favor of the Clulees, would have altogether eliminated the need for a trial, because she needed to be in court to listen to the testimony and review the evidence, in the same manner as the judge. In fact,

during the trial the law clerk questioned witnesses. In addition, the trial had to be suspended for a number of days because the law clerk wanted to take a break so that she could travel out of town and visit her mother. Rather than continue to hear testimony in the law clerk's absence, the trial judge recessed the trial so that the law clerk could travel out of town and visit her mother.

When the trial resumed, the trial judge ruled on and denied the Clulees' motion for leave to amend their answer to raise *Noerr-Pennington* immunity as an affirmative defense. However, at the end of that day, the trial judge attempted to rule on a motion for summary judgment on *Noerr-Pennington* immunity which the Clulees had filed only four days before the trial. That ruling follows:

(Court) The motion of defendant's Mr. and Mrs. Clulee and Home Place Batture Leasing, N/C Materials for Summary Judgment is denied. The reasons will be given.

(Law Clerk) Judge, it's not that the merits are denied, it's denied because they set it after the trial. The merits of the motion will be addressed in the opinion.

(Court) The merits of the motion are going to be addressed in the opinion . . . .

Mr. Durant and Bayou Fleet were stunned to say the least. A law clerk had just countermanded a ruling of a federal judge. He had denied a motion for summary judgment on *Noerr-Pennington* immunity. That denial was consistent with his order earlier that same day when he ruled that the Clulees could not amend their answer to raise *Noerr-Pennington* as an affirmative defense. But apparently, the law clerk had decided that a ruling was going to be issued on the merits of *Noerr-Pennington* immunity and she changed the federal judge's ruling denying the motion for summary judgment.

This Court has repeatedly stated that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Clearly, conduct and participation of court staff during a non-jury trial, that the appellate court described as "unusual", "troubling", and "unfortunate", does not satisfy the appearance of justice. Further, it damages the purity of the judicial process and its institutions thereby requiring a reversal and a new trial.

The right of access to the courts has been characterized by this Court in the following terms:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142,

148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907). "The right of access . . . is designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief." *Crowder v. Sinyard*, 884 F.2d 804, 814 (5th Cir. 1989).

"Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge's law clerks and secretaries." *Hall v. Small Business Admin.*, 695 F.2d 175, 176 (5th Cir. 1983). In this case, there was clear record evidence which created an appearance that the judge's law clerk, and not the court, was making a determination on whether Bayou Fleet's claim was meritorious. Thus, Bayou Fleet's right of access was not meaningful and the appearance of justice was not satisfied. Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

6. Whether, after a trial, a partial consent judgment can be modified by the district court based upon the lack of consent of a party?

The appellate court rejected Bayou Fleet's argument that the district court's modification of the partial consent judgment should be reversed. The appellate court based its decision on the mistaken belief that Bayou Fleet had not raised the issue of whether its property had maintained its non-conforming zoning status for sand pits, a ship yard and

a rock yard. That was a primary issue in the case which Bayou Fleet had alleged in its amended complaint seeking a declaration that the Special Legal Counsel Resolution and Levee Law Ordinance were unconstitutional.

The appellate court also rejected Bayou Fleet's argument on the basis of its mistaken belief that Bayou Fleet introduced the partial consent judgment in a state court lawsuit which the Clulees had filed. Bayou Fleet did not do that and could not have done that because it was not a party in that lawsuit. The appellate court also stated that the Clulees' state court lawsuit was filed to determine whether Bayou Fleet's property had maintained its non-conforming zoning status. That is also incorrect. The Clulees' state court lawsuit was a mandamus action which sought to have the state court prevent the Parish Council from voting on whether it should approve the settlement in this case.

What is most troubling about the appellate court's decision on this issue is that it completely disregarded the trial on the merits (which the Clulees participated in) wherein the district court ruled that Bayou Fleet's property had maintained its non-conforming status. In so ruling, the appellate court disregarded settled law, particularly this Court's opinion in *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

In *Local No. 93*, this Court ruled that a court may enter a consent decree despite the objections and lack of consent of a party. Specifically, this Court stated that:

> It has never been supposed that one party--whether an original party, a party that was joined later, or an intervenor--could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

Id., 478 U.S. at 528-29, 106 S.Ct. at 3079.

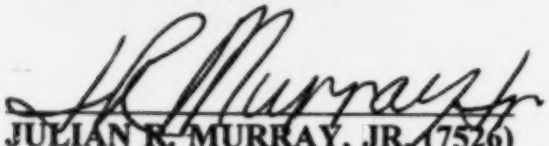
With the Clulees involvement and participation, the district court ruled that Bayou Fleet's property had maintained its non-conforming status. See, Appendix B. Once those findings were made, the only plausible basis for modification of the partial consent judgment was the Clulees' lack of consent. However, as clearly announced by this Court in *Local No. 93*, that reason cannot stop the entry of such a decree. Otherwise, it would work a significant deterrence contrary to the federal policy of encouraging settlement agreements. See, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213-15, 114 S.Ct. 1461, 1468, 128 L.Ed.2d 148 (1994) ("Public policy wisely encourages settlements."). Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

CONCLUSION

For the foregoing reasons, petitioner, Bayou Fleet, Inc., prays that this Court grant this application for writ of certiorari to examine the issues presented herein, and in the event of a ruling on the merits in favor of petitioner, that the matter then be remanded to the United States Fifth Circuit Court of Appeals for further proceedings.

Respectfully submitted:

CHEHARDY, SHERMAN, ELLIS, BRESLIN & MURRAY



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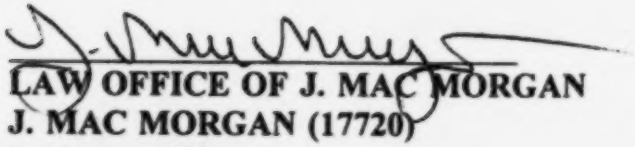

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(2)

Supreme Court, U.S.
FILED

No. 001068 DEC 26 2000

OFFICE OF THE CLERK

In the Supreme Court of the United States

BAYOU FLEET, INC.
Petitioner

VERSUS

HOME PLACE BATTURE LEASING, INC., NEAL CLULEE, MARY CLULEE and N/C MATERIALS, INC.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
NOV 2 8 2000

No. 99-31172

BAYOU FLEET, INC.,
Plaintiff-Appellant,

VERSUS

ELLIS A. ALEXANDER, ET AL,
Defendants

HOME PLACE BATTURE LEASING, INC.;
NEAL CLULEE; MARY CLULEE;
N/C MATERIALS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before KING, Chief Judge, PARKER, Circuit Judge, and FURGESON, District Judge.

ROBERT M. PARKER, Circuit Judge:

*District Judge of the Western District of Texas sitting by designation.

Appellant Bayou Fleet, Inc. appeals from the district court's order granting Mary and Neal Clulee's motion to amend the partial final consent judgment and the district court's final judgment dismissing Bayou Fleet's claims with prejudice. Bayou Fleet filed this action against Ellis Alexander; St. Charles Parish; the Parish's insurer, Coregis Insurance Company; Neal Clulee and his wife Mary Clulee ("the Clulees"); and the Clulees' two companies, Home Place Batture Leasing, Inc. ("Home Place") and NIC Materials, Inc. Bayou Fleet alleged that the defendants conspired to eliminate it from the sand pit business through challenges to its zoning status and through attempts to persuade authorities against issuing permits. Specifically, Bayou Fleet alleged that the defendants abused its constitutional rights through a civil conspiracy under 42 U.S.C. § 1983 and violated the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Louisiana Unfair Trade Practices Act, LA. REV. STAT. ANN. § 51:1401, et seq., through their efforts to put its sand pit operation out of business.

Before trial, Bayou Fleet settled with Alexander, St. Charles Parish, and Coregis Insurance Company. In lieu of the settlement, the court entered a consent judgment, but later amended portions of the judgment that pertained to Bayou Fleet's zoning status. At the close of a non-jury trial, the district judge denied Bayou Fleet relief against the Clulees, holding that the Clulees were immune from liability under the *Noerr-Pennington doctrine. See Bayou Fleet, Inc. v. Alexander,* 68 F. Supp. 2d. 734, 744 (E.D. La. 1999) . Bayou Fleet argues on appeal that the trial court effectively denied its First Amendment right of access to the courts, abused its discretion by amending the consent judgment, and

erred in its dismissal of the case under the *Noerr-Pennington doctrine.*

I.

This case involves one of several disputes in a long feud between the Durant family and the Clulee family in Hahnville, Louisiana.[1] Both families own businesses alongside the Mississippi River in St. Charles Parish. The conflict in this case concerns the Clulees' attempts to curtail the Durants' sand pit operations. The Durants own plaintiff-appellant Bayou Fleet, and the Clulees own defendants-appellees Home Place and NIC Materials. Bayou Fleet and Home Place maintained the only active sand pits in Hahnville.[2]

In 1997, Ronald Adams Contractors, Inc. ("Adams") needed sand from the Mississippi River to construct roads in a nearby parish. Adams required a permit from the U.S. Army Corps of Engineers to dredge sand from the Mississippi and a permit from the LaFourche Basin Levee District Board of Commissioners ("the Levee Board") to operate a sand pit, in which the sand would be stored until trucks hauled it to the construction sites. After receiving bids from local sand pit operators, Adams chose Bayou Fleet.

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[1] For a history of the controversy between the parties in this case, *see Bayou Fleet*, 68 F. Supp. 2d. at 736-743.

[2] A third sand pit, owned by the Giambelluca family, went out of business after a dispute between the Giambellucas and the Clulees. *See Giambelluca v. Parish*, 687 So.2d 424 (La. Ct. App. 5th Cir. 1996).

Adams filed for the necessary permits in March of 1997. Shortly thereafter, the Corps of Engineers received a number of complaints from residents near Bayou Fleet's property who opposed the operation of sand pits in the area. The neighbors complained that sand pit operations create health risks from air pollution, safety problems around the pits, and general nuisances from trucks traveling to and from the pits.

Robin Durant and a representative from Adams met with Ellis Alexander, a Parish Councilmember renowned for his oppositions to sand pits. Durant and Adams assured Alexander that all precautions would be taken to reduce the hazards caused by the sand pit operations. Alexander did not openly oppose Bayou Fleet's operations at their meeting.

In order to solicit business for his own sand pit, Neal Clulee set up a meeting with Adams to discuss the sale of sand from Homplace. At the meeting, Clulee informed Adams that he opposed the Bayou Fleet operation and that, unlike Bayou Fleet, "he could keep the local authorities satisfied." *Bayou Fleet,* 68 F. Supp. 2d at 738. Adams declined Mr. Clulee's offer.

Bayou Fleet claims that the alleged conspiracy between Alexander and the Clulees began on April 28, 1997. On this date, telephone records show that Neal Clulee made several attempts to contact Alexander. Shortly after the calls, Alexander informed Earl Matherne, Director of the Department of Planning and Zoning for St. Charles Parish, that Alexander's constituents were objecting to Bayou Fleet's

sand pit operations under the Parish's zoning ordinance.[3] Matherne submitted the zoning issue to the Parish Attorney, who, after reviewing Bayou Fleet's business records, concluded that Bayou Fleet had not lost its non-conforming use status.

Bayou Fleet claims that the conspiracy continued from May through December of 1997, in which time Alexander argued before the Parish Council, the St. Charles Parish Coastal Zone Advisory Committee ("the Zoning Committee"), and the Levee Board against Bayou Fleet's sand pit operations. Neal Clulee made over forty phone calls to Alexander's home during this time. The telephone company's records show that many of these calls corresponded to Alexander's protests before local authorities.[4]

On May 29, 1997, at a regular Zoning Committee meeting, Alexander and the Clulee's lawyer, Joel T. Chaison, urged the committee to recommend that the Parish Council submit a letter of objection to the Corps of Engineers

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[3] The zoning ordinance restricted the operation of sand pits, but allowed preexisting sand pits to continue in use as long as operations did not cease for six months. Therefore, Bayou Fleet could continue its non-conforming use so long as it had not let its sand pit business cease operations for six months.

4 The Clulees also attempted to sway public officials without Alexander's help. On May 30, 1997 and July 3, 1997, Mary Clulee wrote to the Corps of Engineers protesting Adams' proposed dredging permit. Mrs. Clulee claimed that Adams intended to dredge sand from a section of the river located immediately in front of the Clulees' property. Despite Adams' assurance in June of 1997 that it would not dredge in front of the Clulee property, the Clulees maintained their opposition to the project.

concerning Adams' permit. Seven members of the public also spoke in opposition to Adams' project at the meeting. That same day, Clulee placed two telephone calls to the Alexander residence. Despite Alexander's protests, the Zoning Committee issued a recommendation to the Parish Council that supported Adams' project.

On June 2, 1997, at a regularly scheduled meeting of the Parish Council, Alexander proposed a resolution to issue a letter of objection to the Corps of Engineers urging the denial of Adams' permit application. Alexander suggested that, in the alternative, Adams should be required to take extra precautions to eliminate safety and health hazards by using Home Place's access ramp instead of Bayou Fleet's ramp, because the latter was located too close to residential neighborhoods. Because there was no road to the Clulees, ramp from Bayou Fleet's property behind the levee, the alternative proposal had the same effect as the letter of objection. Nonetheless, the Parish Council adopted Alexander's resolution. Prior to the Levee Board meeting, Neal Clulee made four calls to Alexander's home.

Alexander forwarded the Parish Council's objection to the Levee Board, which, in turn, denied Adams' permit. Without the Levee Board's permission to stockpile and move the sand over the levee, the Corps of Engineers could not issue a permit to dredge the sand out of the river. However, Adams was able to postpone a final decision from the Corps of Engineers until a second meeting of the Levee Board.

On July 1, 1997, the Levee Board reconsidered its previous decision and granted Adams' operation permit.

Alexander, Adams, and Durant attended the meeting. Although the Clulees were not present, Neal Clulee placed two calls to Alexander's residence before the meeting.

At the following Parish Council session, Alexander proposed a resolution to audit Bayou Fleet's sales tax returns. Although the Parish Council denied Alexander's proposition, Alexander was able to convince the St. Charles Parish Tax Collection Department to conduct a sales tax audit of Bayou Fleet, which resulted in no tax violations. During this period, the Clulees placed two more telephone calls to Alexander.

On July 14, 1997, Bayou Fleet filed the present lawsuit against Alexander, the Parish, the Clulees and the Clulees' companies, Home Place and NIC Materials.

Despite the fervent opposition by Alexander to Adams' operation, the Corps of Engineers issued Adams a permit to dredge on July 21, 1997.

Nonetheless, Alexander continued his assault against Bayou Fleet's sand pit operation. At the Parish Council meeting on September 8, 1997, he proposed a new Levee Law ordinance and a Special Legal Counsel resolution The Council adopted the proposals over the veto of the Parish President. The Levee Law required the permission of the Parish Council before anyone was allowed to cross over the levee. Violation of the ordinance was a criminal offense. The Special Legal Counsel resolution mandated the appointment of legal counsel to conduct an investigation into Bayou Fleet's zoning status. Alexander requested that Joel T.

Chaisson, the Clulees' attorney, be appointed to the the position.

Bayou Fleet filed for an injunction and for declaratory relief in federal district court. The district court held that the Levee Law and the Special Legal Counsel resolution was submitted in retaliation to Bayou Fleet's law suit and "with a bad faith intent to injure Bayou Fleet." *Bayou Fleet Inc. v. Alexander*, 1997 WL 625492, *8 (E.D. La. Oct. 7, 1997). The court concluded that the ordinance and resolution violated the equal protection clause of the Fourteenth Amendment.

On March 12, 1998, Alexander filed a motion for summary judgment. The district court granted the motion and dismissed Bayou Fleet's claims against Alexander in his individual capacity under the *Noerr-Pennington* doctrine. The court held that Alexander was personally immune from liability for his appearances before the Zoning Committee and the Levee Board. *See Bayou Fleet, Inc. v. Alexander*, 26 F. Supp. 2d 894, 897 (E.D. La. 1998).

The district court's ruling on the Parish Council ordinances and the court's dismissal of the suit against Alexander prompted settlement negotiations between the remaining parties. The defendants, with the exception of the Clulees, reached a settlement on December 9, 1998. The settlement required the Parish Council to recognize Bayou Fleet's nonconforming use status. The district judge signed the consent judgment on January 21, 1999.

Before the parties reached their settlement agree-

ment, the Clulees filed a mandamus action in state court to challenge Bayou Fleet's operations under the zoning restrictions. In response to the federal court's consent judgment, the Clulees filed a motion to amend or alter the judgment, claiming that the federal judge's consent decree affected their rights in state court. The district judge granted the Clulees' motion. Bayou Fleet argues on appeal that the court abused its discretion by amending the consent judgment.

On February 12, 1999, ten days before trial, the district judge ordered Bayou Fleet and the Clulees to submit briefs on whether the Clulees were entitled to *Noerr-Pennington* immunity. Bayou Fleet argued that because the Clulees did not timely raise *Noerr-Pennington* as an affirmative defense, the issue was waived. The Clulees moved for summary judgment, but the court declined to rule on the motion until the conclusion of trial. Bayou Fleet and the Clulees proceeded to trial before the district judge on February 22, 1999. The trial court entered its judgment dismissing Bayou Fleet's case for reasons of *Noerr-Pennington* immunity on September 29, 1999.

II.

A. Right of Access to Courts

In its first point of error, Bayou Fleet claims that it was denied its First Amendment right of access to the courts because of a law clerk's improper participation in the non-jury trial. Bayou Fleet claims that the law clerk directed the district judge during the course of proceedings to the extent that the law clerk effectively presided over the trial. It argues

that the law clerk's participation denied it meaningful access to the courts.[5]

Bayou Fleet points to several instances in the trial record that it claims are representative of the law clerk's leading role in the proceedings. First, the law clerk interrupted the judge regarding the time when the judge could rule on a motion. After the judge answered an attorney's question regarding the time when he would rule on a motion, the law clerk interjected stating, "Judge, there is no way we can rule on it by 1:30 today because I am sitting in the courtroom right now." To which the judge replied to counsel, "It will have to be later."

Second, Bayou Fleet complains that the law clerk questioned witnesses and corrected the judge's ruling on the defendants' motion for summary judgment. The judge stated that the motion for summary judgment was denied, and the law clerk interrupted stating, "Judge, it's not the merits that

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[5] Bayou Fleet cites several cases from this Court where either counsel or the judge should have been disqualified because of a law clerk's special knowledge of a case. See Hall v. Small Business Administration, 695 F. 2d 175 (5th Cir. 1983) (holding that a law clerk's continuing participation with a judge in a case in which her future employer was counsel gave rise to an appearance of impartiality) ; Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251 (5th Cir. 1978) (concluding that counsel had an unfair advantage because he worked as the judge's law clerk in an earlier trial of the case) ; Kennedy v. Great Atlantic & Pacific Tea Co., Inc., 551 F.2d 593 (5th Cir. 1977) (holding that a law clerk could not gain special knowledge of a case through his own investigation of the facts). The law clerk in this case did not have special knowledge of the facts that would raise an appearance of impartiality. These cases do not address the issue of whether a law clerk's participation at trial precludes a litigant's right of access to the courts.

are denied, it's denied because they set it af ter trial. The merits of the motion will be addressed in the opinion." Bayou Fleet argues that this exchange clearly indicates that the law clerk was ruling on the motion instead of the judge.

Finally, Bayou Fleet points out that the judge interrupted court for two days so the law clerk could travel out of town to visit her mother. Bayou Fleet alleges that the court's decision to postpone the trial suggests that the judge was incapable of presiding over the trial without the law clerk present.

The Clulees insist that Bayou Fleet has taken the law clerk's behavior out of context. The Clulees assert that the judge intervened and ruled on objections throughout the trial without the clerk's assistance. They claim that, in any event, after two years of pretrial proceedings that culminated in several published and unpublished opinions, Bayou Fleet cannot convincingly argue that it was denied access to the courts.

Access to the courts is a constitutionally protected fundamental right and one of the privileges and immunities awarded citizens under Article IV and the Fourteenth Amendment. *See Chambers v. Baltimore & Ohio Railroad,* 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907). The First Amendment right to petition the government has as one aspect the right of access to the courts. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ; *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979) ; *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Coastal States*

Marketing, Inc. v Hunt, 694 F.2d 1358, 1363 (5th Cir. 1983) Judge Thornberry's writing in *Ryland v. Shapiro,* 708 F.2d 967 (1983), serves to guide our analysis today. Relying on *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) and *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979), we learn in *Ryland* that

> A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful."

We therefore have reviewed this record to determine whether the unusual and troubling participation in this non-jury trial by the judge's law clerk served to deny *Bayou Fleet* meaningful access to the courts. Our review is further guided by the recognition that Article III of the constitution vesting power in the Federal Courts can only be read to vest the power of the court in its officeholder - the judge. Indeed the judge is the only person involved in the trial of cases in Federal Court who has taken an oath pursuant to Article III. It follows that the constitution requires those functions traditionally comprising the act of judging be performed by the judge.

Our review of the record persuades us that *Bayou Fleet* was not denied meaningful access to the courts. The judge was engaged in the pretrial stage and the trial itself. He questioned both witnesses and lawyers during the trial, ruled on the evidence and made those decision that were necessary for a traditional trial. We therefore, can not say that in this case that staff usurped the judge's role in the decision-making process of the trial. The involvement of the

judge's law clerk in the trial was unfortunate and the judge should take whatever action is necessary to make sure that it does not recur.

B. The Consent Judgment

Before Bayou Fleet, the Parish, Alexander and Coregis Insurance Company reached their settlement agreement, the Clulees filed suit in state court to determine whether Bayou Fleet properly retained its zoning status. After the district judge signed the consent judgment, Bayou Fleet introduced the judgment in state court claiming that the proceeding was barred by the doctrine of res judicata. The Clulees filed a motion in federal district court to amend or alter the consent judgment. The district court granted the Clulees' motion. Bayou Fleet alleges that the court abused its discretion by amending the judgment.

A consent judgment, also known as a consent decree, is freely negotiated by the parties and has the full effect of res judicata. *See United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) (en banc) (Rubin, J.) . Because a consent judgment has a continuing affect on the rights of litigants, courts are required to ascertain whether the parties agreement "represents a reasonable factual and legal determination based on the facts of the record . . .. " *Id.* at 441. "A consent decree must arise from the pleaded case and further the objectives of the law upon which the complaint is based." *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (citing *Local No. 93, Intfl Ass'n of Firefighter v. City of Cleveland*, 478 U.S. 501, 525 (1986)) . When litigants reach a settlement that also affects

third parties, "the court must be satisfied that the affect on them is neither unreasonable nor proscribed." *City of Miami*, 664 F.2d at 441. We review the approval. or denial of a consent judgment for abuse of discretion. *See Williams v. City of New Orleans*, 729 F.2d 1554, 1558 (5th Cir. 1984).

Bayou Fleet argues that the zoning issue was resolved in the court's October 1997 order, in which the judge held that the Parish Council's Levee Law and Special Legal Counsel resolution was unconstitutional. Bayou Fleet also claims that the Clulees should not be able to attack the consent judgment simply because they refused to approve the final settlement.

A consent judgment must be founded on the legal and factual issues raised in the pleadings. *League of United Latin Amer. Citizens,* 999 F.2d at 846. Bayou Fleet petitioned the district court for relief under section 1983 and antitrust laws and for an injunction and declaratory relief regarding the Parish Council ordinances. The parties did not ask the court to resolve the zoning issue in their pleadings, and the court's October 1997 order did not determine whether Bayou Fleet retained its zoning status.[6]

Courts must also examine the effect of a consent judgment on third parties. *See Local No. 93, Intfl Assfn of*

[6] The district court's order states, "The evidence supports the Parish Council's conclusion that Bayou Fleet did not lose its non-conforming status." *See Bayou Fleet v. Alexander*, 1997 WL 625492, *8 (E.D. La. 1997). Put into context, the court's assertion indicates that the defendants did not provide adequate reasons why special legal counsel should be appointed since the Parish Council had previously investigated Bayou Fleet's zoning status. See *id*. The court did not reach a legal conclusion concerning the zoning ordinances applicability to Bayou Fleet.

Firefighter, 478 U.S. at 529. Louisiana law allows any person to file a civil action to enforce compliance with zoning restrictions. See LA. REV. STAT. ANN. § 9:5625 (1997) . Even though the Clulees participated in the negotiation process, they did not agree to the settlement terms. Instead, they filed suit in state court to determine the zoning dispute. Just because the Clulees participated in settlement negotiations and refused to acquiesce to the settlement terms does not alleviate the district court's duty to assess the judgment's affect on their rights. By signing the consent judgment, the district judge frustrated the Clulees' right to file an action in state court to enforce the zoning restrictions. Because the consent judgment adversely affected the rights of non-settling third parties, the district court did not abuse its discretion by amending the consent judgment.

C. *Noerr-Pennington* Immunity

The *Noerr -Pennington* doctrine confers immunity to private individuals seeking anticompetitive action from the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) . *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (extending *Noerr-Pennington* protection to petitioning activities aimed at state and federal agencies and courts) ; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (granting *Noerr-Pennington* immunity for efforts to influence local governments) . *Noerr-Pennington* immunity applies to any concerted effort to sway public officials regardless of the private citizen's intent. *See Pennington*, 381 U.S. at 670. Although

the Supreme Court has limited its discussion of *Noerr-Pennington* immunity to cases involving antitrust litigation, this Court has extended the *Noerr-Pennington* doctrine to include claims under section 1983. *See Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) .[7]

The district court held that the *Noerr-Pennington* doctrine was not an affirmative defense and that the issue of immunity could be raised at any time. The court further concluded that the Cluelees were immune under *Noerr-Pennington* for contacting Alexander concerning Alexander's attempts to thwart Bayou Fleet's sand pit operations. The district court therefore dismissed Bayou Fleet's

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[7] *Noerr -Pennington* immunity does not stem solely from the First Amendment; rather, it is inextricably associated with interpretations of - the Sherman Act. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) . The Tenth Circuit has pointed out that the *Noerr-Pennington* doctrine should not describe immunity that arises only from the First Amendment right to petition. *See Cardtoons, L.C. v. Major League Baseball Players Assfn*, 208 F.3d 885, 888-91 (10th Cir. 2000) ("While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the *NoerrPenningtondoctrine* . . . . ") . However, where an individual's conduct raises *Noerr-Pennington* immunity under antitrust law, the same conduct "is also out of the scope of section 1983 liability." Video Int-11 Prod.., Xnc., 858 F.2d at 1084. The Clulees may be entitled to immunity both under the Noerr-Pennington doctrine for purposes of antitrust liability and the First Amendment for purposes of Bayou Fleet's section 1983 claim. Because the same facts and legal analysis apply to both theories of immunity, we will not make a distinction between the two.

section 1983, Sherman Act, and Louisiana Unfair Trade Practices Act claims. *See Bayou Fleet v. Alexander,* 68 F. Supp. 2d 734 (E.D. La. 1999) .

Bayou Fleet argues on appeal that *Noerr -Pennington* immunity is an affirmative defense, which was waived because the Cluelees failed to timely assert it under Rule 8 (c) of the Federal Rules of Civil Procedure. Bayou Fleet also contends that, in the alternative, the *Noerr-Pennington* doctrine does not apply to the behavior exhibited by the Clulees.

1. Waiver of the *Noerr-Pennington* Affirmative Defense

As we recently held in *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000), the *Noerr-Pennington* doctrine should be raised as an affirmative defense.[8] Generally, a party's failure to raise an affirmative defense in its first responsive pleading results in waiver. *Lucas v. United States,* 807 F.2d 414, 417 (5th Cir. 1986). "However, where 'the matter is raised by the trial court [or the litigants] that does not result in unfair surprise, technical failure to comply precisely with Rule 8(c) is not fatal,' and in such a situation a court may hold that the defense is not waived." *McConathy v. Dr. PepperlSeven Up Corp.*, 131 F. 3d 558, 562 (1998) (quoting Lucas, 807 F. 2d at 417) . An

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[8] In *Acoustic Systems*, we stated that the *Noerr-Pennington* doctrine does not provide persons complete immunity from suit; rather, the "doctrine provides only an affirmative defense...." *Acoustic Systems, Inc.*, 207 F.3d at 296. The trial court erred in holding that *Noerr-Pennington* immunity should not be raised as an affirmative defenses.

affirmative defense is not waived if it is raised at a "pragmatically sufficient time, and the plaintiff was not prejudiced in its ability to respond." *Chambers v. Johnson*, 197 F.3d 732, 735 (5th Cir. 1999) (quoting Lucas, 807 F.2d at 418) We therefore look to the record to ascertain whether the trial court raised *Noerr-Pennington* at a pragmatically sufficient time and whether Bayou Fleet was prejudiced by the delay in raising the defense. *See id.*

Noerr-Pennington was first raised by Ellis Alexander in his motion for summary judgment filed on January 2, 1998. Alexander claimed that he was entitled to immunity for his personal efforts to persuade the Levee Board, the Zoning Committee, the Army Corps of Engineers and the Parish Council to curtail Bayou Fleet's sand pit operations. Bayou Fleet submitted a memorandum on the *Noerr-Pennington* issue in response to Alexander's motion. The district court dismissed Bayou Fleet's suit against Alexander in its September 1998 order. *See Bayou Fleet v. Alexander*, 26 F. Supp. 2d 894 (E.D. La. 1998) . Hence, Bayou Fleet was aware that *Noerr-Pennington* was an issue in the case at least by January 2, 1998.

After its order dismissing Alexander in his personal capacity, the Clulees raised the issue for the second time in the Pre-Trial Order dated February 4, 1999, approximately eighteen days before trial. Although Bayou Fleet objected to immunity as a contested issue of law, it does not appear that the court ever ruled on the objection. On February 11, 1999, the district judge requested each party to submit a brief on the applicability of *Noerr-Pennington*. The Clulees then filed a motion for summary judgment on the basis of *Noerr-*

Pennington immunity. Bayou Fleet also submitted its memorandum claiming either that *Noerr-Pennington* had been waived or that it did not apply.

The non-jury trial began on February 22 and continued through March 1. During trial, the Clulees sought to amend their original answer to include the *Noerr-Pennington* issue, but the trial court denied their motion. The court specifically stated that its ruling was not a finding that the issue had been waived.

Bayou Fleet relies on *Haskell v. Washington Township,* 864 F.2d 1266, 1273 (6th Cir. 1988), in which the Sixth Circuit found that the trial court could not raise *sua sponte* a statute of limitations defense after three years of litigation. Unlike the litigant in *Haskell*, Bayou Fleet knew that *Noerr-Pennington* was an issue in the case when Alexander filed his motion for summary judgment almost one year before trial. Bayou Fleet's argument that it was unfairly surprised by the Clulees' attempts to raise immunity in the Pretrial Order is untenable.

Bayou Fleet argues that its inability to conduct discovery concerning the "sham" exception to the *Noerr-Pennington* doctrine resulted in prejudice. At no time after the issue was raised in the Pretrial Order did Bayou Fleet move for a continuance to conduct discovery concerning the "sham" exception. Instead, Bayou Fleet argued in its pretrial memorandum that it was prejudiced by the timing of the immunity issue, but it did not state how. On appeal, Bayou Fleet claims for the first time that they were not given the opportunity to conduct adequate discovery. Given the fact

that Bayou Fleet knew *Noerr-Pennington* was a potential issue throughout most of the discovery process, we find no evidence that Bayou Fleet was prejudiced. Thus, the trial court did not err by addressing the *Noerr-Pennington* issue.

2. Applicability of the *Noerr-Pennington* Doctrine to the Cluelees

Bayou Fleet argues, in the alternative, that the *Noerr-Pennington* doctrine does not apply to the Clulees' lobbying efforts. Bayou Fleet points to the courts October 1997 order in which the district court concluded that Alexander's proposals were proffered in retaliation to Bayou Fleet's law suit. Bayou Fleet contends that *Noerr-Pennington* does not apply to retaliatory behavior or conduct in furtherance of a conspiracy. Specifically, Bayou Fleet claims that the *Noerr-Pennington* doctrine should not protect defendants who retaliate against plaintiffs for exercising their First Amendment right to petition the courts.

The Supreme Court has clearly stated that efforts to influence public officials will not subject individuals to liability, even when the sole purpose of the activity is to drive competitors out of business. *See Pennington*, 381 U.S. at 670. The Court has allowed only one exception to the *Noerr-Pennington* doctrine--the "sham" exception. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 380.[9]

[9] Bayou Fleet urges this Court to ignore the *Noerr-Pennington* doctrine because the defendants were allegedly involved in a civil rights conspiracy. A conspiracy exception to *Noerr-Pennington* immunity has been explicitly rejected by the Supreme Court unless the conspiracy "reaches beyond mere anticompetitive motivation." *Omni Outdoor Advertising, Inc.*, 499 U.S. at 383. Bayou Fleet did not allege that the Clulees motives included anything other than their desire to put its sand pit out of business.

The "sham" exception involves attempts to influence public officials for the sole purpose of expense or delay. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 380. The exception applies to defendants who use the process as an anti-competitive weapon, rather than those who genuinely seek to achieve an intended result. See *id.* at 381. The evidence must show that a defendant's lobbying activities were "objectively baseless" for the "sham" exception to apply. *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ; *Brown & Root, Inc. v. Louisiana State AFL-CIO,* 10 F.3d 316, 324 (5th Cir. 1994). Lobbying activity is objectively baseless if a reasonable private citizen could not expect to secure favorable government action. *See Professional Real Estate Investors,* 508 U.S. at 60 ("[T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits").

Bayou Fleet argues that the Clulees lobbied local officials in retaliation to Adams' contract with Bayou Fleet and, later, Bayou Fleet's lawsuit. Bayou Fleet does not assert that the Clulees' endeavors were objectively unreasonable. To the contrary, the evidence shows that a reasonable private citizen could expect to secure favorable government action. See *id.* The Clulees contacted a Parish Council-member and wrote letters to the Army Corps of Engineers in hope to deny Adams permits and revoke Bayou Fleet's non-conforming zoning status. Their efforts resulted in the Parish Council's adoption of a letter of objection to Adams' dredging permit, a review of Bayou Fleet's zoning status, and the approval of the Levee Law and Special Legal Counsel resolution. Because the Clulees achieved favorable results, their

endeavors were, by definition, reasonable. See *id.* at 61 n.5. The "sham" exception therefore does not exclude the Clulees from *Noerr-Pennington* protection.

Bayou Fleet asks this Court to create a new exception to the *Noerr-Pennington* doctrine based on a defendant's retaliatory conduct. Bayou Fleet claims that the Clulees' should not be protected under *Noerr-Pennington* because their lobbying activities affected its First Amendment right to petition the courts for relief. Bayou Fleet claims that *Noerr-Pennington* cannot be used to illegally abridge the rights of other citizens. The Supreme Court has not established a separate exception to the *Noerr-Pennington* doctrine for retaliatory intent, and we decline to create a new exception here.

In *California Motor Transport*, the Supreme Court held that First Amendment rights may not be used to deter competitors "from having 'free and unlimited access' to the agencies and courts." 404 U.S. at 515. The Court concluded that attempts to deter competitors from petitioning the courts and government agencies were not protected under *Noerr-Pennington*. *See id.* However, the Court's holding in *California Motor Transport* is limited to the confines of the "sham" exception. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 1355. As a result, *Noerr-Pennington* applies to all genuine lobbying efforts, despite subjective intent and the net effects on a competitor's First Amendment rights. *See Professional Real Estate Investors,* 508 U.S. at 57. Thus, retaliatory lobbying efforts are not per se excluded from *Noerr-Pennington* protection unless the "sham" exception applies.

Bayou Fleet does not argue and the record does not show that the Clulees lobbying efforts were objectively unreasonable. We therefore conclude that the district court's dismissal of Bayou Fleet's section 1983, Sherman Act, and Louisiana Unfair Trade Practices Act claims was not error. *See Omni Outdoor Advertising, Inc.*, 499 U.S. at 384 (applying *Noerr-Pennington* to dismiss an antitrust claim under state law) ; *Video Int'l Prod., Inc.*, 858 F. 2d at 1084 (applying *Noerr-Pennington* to shelter individuals from liability under section 1983).

III.

In sum, we conclude that the law clerk's role in the non-jury trial did not affect Bayou Fleet's right of meaningful access to the courts. We also affirm the district court's order granting the amendments to the consent judgment and the court's dismissal of Bayou Fleet's case against Mary and Neal Clulee pursuant to the *Noerr-Pennington* doctrine.

AFFIRM

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Oct 7, 1997

BAYOU FLEET, INC.	CIVIL ACTION
VERSUS	NO. 97-2205
ELLIS ALEXANDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A COUNCIL MEMBER OF THE ST. CHARLES PARISH COUNCIL, ET AL.	SECTION "1" (3)

ORDER AND REASONS

Bayou Fleet, Inc. filed this action on July 14, 1997, asserting claims under 42 U.S.C. § 1983 against Ellis Alexander, individually and as a member of the St. Charles Parish Council ("Council"), Neal Clulee, Mary Clulee, and the Clulee's company Home Place Batture Leasing, Inc. ("Home Place"). Bayou Fleet alleges in its complaint that Alexander engaged in arbitrary and capricious actions which he took under color of state law in furtherance of a conspiracy among himself, the Clulees, and Home Place. The alleged object of the conspiracy was to obtain through a series of zoning challenges, the elimination of Bayou Fleet as a business competitor of the Clulees, and their company.

DATE OF ENTRY OCT 7 1997

On September 8, 1997, subsequent to the filing of this lawsuit, Alexander proposed an ordinance and resolution which the St. Charles Parish Council adopted on September 22, 1997 by overriding the Parish President's vetoes.[1] The next day, Bayou Fleet filed an amended complaint seeking an injunction against the enforcement of these acts, and a declaratory judgment that they are violative of the United States Constitution. Bayou Fleet named the St. Charles Parish Council and the Parish insurer as additional defendants.

Bayou Fleet alleges that Alexander proposed the ordinance and resolution as part of the conspiracy to destroy its business. Bayou Fleet alleges that the procedures used to pass the ordinance and resolution, as well as the substance of the measures are violative of its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. Specifically, Bayou Fleet alleges that the ordinance is unconstitutionally vague, and that both measures violate procedural and substantive due process, the equal protection clause, and the First Amendment right of access to the courts.

Both measures were published on October 1, 1997 and were scheduled to become effective on October 8, 1997, in accordance with the St. Charles Parish Home Rule Charter, Article IV, Section B(3)(f). On October 2, 1997, Alexander introduced Emergency Ordinance No. 97-10-2 to suspend the effect of the ordinance in order to "address the

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[1] St. Charles Parish Ordinance No. 97-9-6 ("the ordinance") and St. Charles Parish Resolution No. 4416 ("the resolution").

concerns expressed by several corporate citizens regarding the enactment of Ordinance 97-9-6." The council adopted this Emergency Ordinance on October 6, 1997, to be effective immediately. Because the ordinance at issue is merely suspended and not revoked, the court finds that Bayou Fleet's challenge to the ordinance is not moot. Likewise, the Emergency ordinance has no bearing on the resolution challenged herein, which remains scheduled to become effective October 8, 1997.

The court addresses here only the request for a declaratory judgment and injunctive relief against the ordinance and resolution. At a hearing held on September 30, 1997, this court consolidated the hearing on the request for a preliminary injunction with the merits of the request for a permanent injunction and declaratory relief. The court heard testimony from three witnesses offered by Bayou Fleet: Jerome Benoit, Project Manager for Ronald Adams; Chris Tregre, Parish President; and Robin Durant, an owner of Bayou Fleet. The defendants did not offer any witnesses or documentary evidence.

Federal subject matterjurisdiction exists under 28 U.S.C. § 1331 and 1343(a)(3) as this action arises under 42 U.S.C. § 1983.

I. Facts

Bayou Fleet engages in barge and vessel repair, as well as the ownership and operation of sand pits located along the right descending bank of the Mississippi River in Hahnville, Louisiana located in St. Charles Parish. Bayou Fleet has been in operation for about 50 years. Bayou Fleet

accesses its property by crossing the Mississippi River levee.

The present controversy began in 1997 when Ronald Adams Contractors, Inc. ("Ronald Adams") received a contract on a federally-funded road construction project. Ronald Adams contacted Bayou Fleet to negotiate an agreement to lease its sand pits and fill them with approximately 750,000.00 cubic yards of sand to be used in connection with the road construction project. Neal Clulee approached Ronald Adams and attempted to persuade it to let Home Place be the supplier of the sand. Ronald Adams' business records reflect that Clulee told the Ronald Adams Operations Manager that "if [Ronald Adams] used his sand, he could keep authorities 'satisfied' (Sheriff's Dept., Weight Units, etc.). He left the 'rest' unsaid (if we don' t use him) Ronald Adams chose to do business with Bayou Fleet.

Thereafter, Ronald Adams sought and obtained a permit to improve the levee crossing at Bayou Fleet's property. It then applied for a permit to cross the levee. At that point, Alexander challenged Bayou Fleet's non-conforming status on the ground that it had lost that status by non-use. In this context, "non-conforming status" refers to when a business is exempted from compliance with a zoning regulation based on its continuous use (meaning without a break in use greater than six months) of the property after the zoning regulation is enacted, even though its use would be in violation of the new regulation. If Bayou Fleet were determined to have lost its non-conforming status, Bayou Fleet, as well as its customers like Ronald Adams, would not be able to use its sand pits. Home Place would then be the only sand pit in town.

The St. Charles Parish Attorney reviewed affidavits from truck drivers who hauled sand out of Bayou Fleet's sand pits, records of sale, and photos. He issued an opinion letter dated May 21, 1997 to the Coastal Zone Management Authority that there has been continuous use of Bayou Fleet's sand pits and that Bayou Fleet has not lost its non-conforming status.

Next, Bayou Fleet received in the mail a "Public Notice" for a meeting to be held on May 29, 1997 before the Coastal Zone Advisory Committee concerning "Bayou Fleet sand pits" "to consider an application by Ronald Adams Contractor to reopen and operate the existing sandpits in Hahnville." Notices for Coastal Advisory Committee meetings are normally issued by the Council Secretary on official Council stationary; this notice was not. The notice was signed by Alexander and included his home and business phone numbers, as well a personal comment from him encouraging people to attend or discuss the matter with him.

At the Coastal Zone Advisory Committee meeting, Alexander introduced a resolution which was adopted by the Council to offer a letter of objection to the United States Army Corps of Engineers protesting Ronald Adams' application for a permit to dredge and fill Bayou Fleet's sand pits. The Corps of Engineers issued the permit notwithstanding the Council's objection.

On July 1, 1997, Alexander appeared at a meeting of the Lafourche Basin Levee District Board ("Levee Board") and asked them to deny a permit for Ronald Adams to cross the Mississippi River levee and to stockpile sand in Bayou

Fleet's pits. Alexander threatened the Levee Board that if they did not vote his way, he would recommend to the Council that $1.5 million be withdrawn from their funding. Nevertheless, the Levee Board voted in favor of issuing the permit. After the meeting, when Bayou Fleet's owner Robin Durant told Alexander that he did not enjoy immunity for his actions at a Levee Board meeting, Alexander said, "I'm going to get you."

A week later on July 7, 1997, at a meeting of the Council, Alexander asked the Council to deviate from its published agenda to include a resolution for the St. Charles Parish Tax Collection Department to conduct a sales tax audit of Bayou Fleet's sand pit operations and to hold in abeyance the issuance of any sand-pit permits to Bayou Fleet until completion of the audit. Alexander's proposal to deviate from the agenda did not pass, and consequently, his resolution was not considered. Nevertheless, on July 30, 1997, Bayou Fleet received a notice of a sales tax audit, which was subsequently performed for the tax years 1994 through 1996 on all of Bayou Fleet's operations. All sales and sales taxes were found to be proper except for a minimum amount of sales taxes found to be owed where some out-of-state companies had failed to charge Bayou Fleet sales tax on catalogue purchases it had made.

Bayou Fleet filed this lawsuit on July 14, 1997.

At the next Council meeting on September 8, 1997, Alexander proposed the ordinance and resolution at issue here. The official agenda for the September 8 Council meeting lists a resolution described simply as "Special Legal

Counsel (Councilman Alexander." The ordinance made it a criminal act punishable by a fine not exceeding $500.00 and/or imprisonment not to exceed six months for

> any person, firm or corporation to operate any business, or perform any work on or across or use any portion of the Mississippi River levee in the course of the performance of its work without the express written approval of the St. Charles Parish Council.

The resolution called for the appointment of a "Special Legal Counsel" to determine whether Bayou Fleet had lost the non-conforming status of its property. The resolution acknowledged the opinion of the Parish Attorney that Bayou Fleet has maintained its non-conforming status, yet concluded without reaon that it is "in the best interest of the Parish Council and residents of St. Charles Parish to employ Special Legal Counsel to conduct a thorough investigation of "whether or not Bayou Fleet has had a sand pit operation continuously for the past twelve months on property located on the Mississippi River batture in Hahnville" in the course of which investigation the Special Legal Counsel may "subpoena the business records of Bayou Fleet."

At the hearing on the resolution, Alexander made a specific request to appoint Joel Chaisson as the Special Legal Counsel to investigate Bayou Fleet. Chaisson had attended the earlier Coastal Zone Advisory Committee meeting as the legal representative of Home Place. In addition, Chaisson has acted in a role adversarial to Bayou Fleet in prior litigation. As of the date of this court's hearing, no one had been named as Special Legal Counsel.

The Council voted to adopt both the ordinance and resolution, Bayou Fleet did not receive adequate notice of the proposed resolution and did not attend the September 8, 1997 hearing.

The Parish President Chris Tregre vetoed both measures on September 11, 1997. He provided the Council with detailed legal grounds for the vetoes which include some of the same constitutional problems asserted in this lawsuit by Bayou Fleet. He also provided an opinion letter from the Parish Attorney explaining that the resolution exceeds the police power granted to the Parish Council because it is an attempt to override the authority of the State and its Levee Board.

On September 22, 1997, the Council voted to override the vetoes.

On September 27, 1997, Bayou Fleet telefaxed a request to the Council that it be permitted to cross over the levee to attend to business. As of September 30, 1997, when this court held its hearing, Bayou Fleet had received no response from the Council.

II. Analysis

A. Section 1983

42 U.S.C. § 1983 provides remedies for deprivations of constitutionally protected interests. See Baker v. McCollam, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979). Local governing bodies and local officials in their official capacities can be sued under Section

1983 when a party can establish that he or she has suffered a constitutional deprivation as a result of either "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dept. of Social Services, 436 U.S. 658, 690, 91, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

As there is no dispute that Alexander and the St. Charles Parish Council acted under color of state law, the remaining issue is whether the conduct complained of deprived Bayou Fleet of its federal constitutional rights.

B. The Ordinance

1. Police Power

It is not disputed that St. Charles Parish has the authority to enact legislative measures in the exercise of its lawful police powers .[2]

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[2] The Parish of St. Charles is a post-1974 home rule charter government that adopted its charter pursuant to the terms of the 1974 Louisiana Constitution, art. VI, § 5. Under the Louisiana Constitution, a local governmental subdivision may adopt regulations for land use for public purposes subject to uniform procedures established by law. La. Const. art. 6, § 17(D)(1). However, the Louisiana Constitution also recognizes that the exercise of local police power may not abridge the police power of the State, La. Const. art. 6, § 9, it must be exercised reasonably, and just compensation must be provided for the taking of private property for public purposes. La. Const. art. 1, § 4.

Louisiana statutory law expounds on the exercise of police power:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing authority of all

2. Vagueness

Bayou Fleet contends that the ordinance is unconstitutionally vague in violation of the procedural due process guaranty of the Fourteenth Amendment to the United States Constitution.

"[T]he void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 356, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). It is a basic principle of due process that:

> [A} zoning ordinance which contains no standard for the uniform exercise of the power to grant or deny applications for permits is unconstitutional. To be constitutional, a zoning ordinance must be sufficiently definite to notify citizens of their rights pursuant to the ordinance and must establish adequate standards to govern officials with respect to the uniform treatment of applications for permits under the ordinance.

Footnote 2 continued

municipalities may regulate and restrict the ... use of ... land for ... industry ... or other purposes; provided that zoning ordinances enacted by the governing authority of municipalities ... shall be subject to judicial review on the grounds of abuse of discretion, unreasonable exercise of the police powers, an excessive use of the power herein granted, or the denial of the right of due process, provided, further, that the right of judicial review of a zoning ordinance shall not be limited by the foregoing.

See Morton v. Jefferson Parish Council, 419 So.2d 431, 434 (La. 1982)(citations omitted).

In this case, the ordinance provides for criminal penalties. Where a penal enactment fails to provide minimal guidelines for its application, the law may permit authorities to use the statute to "pursue their personal predilections." *See Kolende,* 103 S.Ct. at 1858.

The ordinance does not specify any procedure for obtaining permission from the Council to work on, cross, or use the levy. No objective standards exist for obtaining permission of the Council. An applicant has no way of knowing what he must do in order to obtain the Council's permission. In the absence of any criteria for a business to be approved for a permit, granting or denying a permit is left solely to the subjective opinions and unbridled discretion of the Council members. Decisions may be made on whim or caprice or other inappropriate basis. Both property and liberty interests are at stake in this zoning ordinance. The court finds that the ordinance is unconstitutionally vague.

Having found that the ordinance is void for vagueness, it is not necessary to address the other alleged constitutional violations presented by this ordinance.

La. Rev. Stat. ann. § 33:4721. The St. Charles Parish Home Rule Charter echoes these principles. See Article I; and Article III, Section A (7) (b)

C. Resolution

1. Force of Law

The Parish Charter provides that " [a] n act of the Parish Council which is to have the force of law shall only be enacted by ordinance." (Emphasis added) Charter, Article IV, Section A. It also provides that "[a]n act of the Parish Council which is not to have the force of law may be enacted by resolution." (Emphasis added) Charter, Article IV, Section H. It further provides that " [t]he Council shall cause each ordinance and resolution having the force and effect of law and each amendment to this Charter to be printed or otherwise reproduced." Charter, Article IV, Section F(2).

The resolution was published in the Official Parish Journal on October 1, 1997 as an official proceeding of the St. Charles Parish Council. The resolution was re-printed and at the bottom the following notice appears: "Resolution approved and shall become law irrespective of the veto of the Parish President."

Considering these facts, the court finds that "resolutions" of the Council are not invariably without the force and effect of law. Regardless of whether an act is called an "ordinance" or a "resolution," and notwithstanding the Charter provision that an act which has the force of law shall only be enacted by ordinance, the court finds that a resolution such as the one in this case has the force of law if it is accorded the same formalities as an ordinance and is published in the official journal as "law." See Little v. City of North Miami, 805 F.2d 962, 966-67 (11th Cir. 1986).

2. Equal Protection

Bayou Fleet contends that the resolution violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it singles out Bayou Fleet for unique treatment from others in a similar position.

The equal protection clause requires that a state and its subdivisions apply legislation and actions evenhandedly to all persons similarly situated in a designated class. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) . A violation of equal protection does not require proof of a deprivation of life, liberty, or property, and does not necessarily require that Bayou Fleet belong to a particular group of individuals. Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995).

A violation of equal protection may be shown where a person who is not a member of a particular group of individuals, is deliberately singled out for disparate treatment from others similarly situated based on impermissible considerations such as to punish the exercise of constitutional rights or malicious or bad faith intent to injure. Esmail, 53 F.3d at 180; Rubinovitz v. Rogato, 60 F.3d 906, 909-10 (1st Cir. 1995); LeClair v. Saunders, 627 F.2d 606, (2nd Cir. 1980). Such situations can create an illegitimate "class of one." Esmail, 53 F.3d at 180 ("A class of one is likely to be the most vulnerable of all").

The level of scrutiny to which the court subjects the resolution depends on whether the resolution affects either a suspect class or a fundamental right. If the challenged action

does not involve either of the two, it will be subject to the traditional standard of review which requires only that the action bear some rational relationship to a legitimate purpose. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 1300, 36 L.Ed.2d 16 (1973). Where the differing treatment impinges upon a fundamental right or disadvantages a suspect class, the governmental conduct is subject to a heightened level of scrutiny and will be sustained only if "suitably tailored to serve a compelling state interest." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

Bayou Fleet contends that the resolution treats it differently from Home Place, which is a similarly situated business, and is without a rational relationship to a legitimate governmental purpose. Bayou Fleet contends that it is being singled out for disparate treatment based on the filing of this suit in violation of its First Amendment right to bring this lawsuit, and for the malicious and arbitrary purpose of eliminating Bayou Fleet as a competitor of Home Place.

The evidence shows that Bayou Fleet and Home Place are in the same business of leasing sand pits located on batture property between the Mississippi River and its levee in Hahnville, Louisiana. Indeed, their businesses are located next to each other along the batture.

During the 1980's, after a five-year period of inactivity at Home Place's sandpit (5-year old willow trees were growing in the pit), Home Place's non-conforming status was challenged by a Council member, now Parish President.

The challenge failed, and Home Place was permitted to resume operations. At no time was a resolution passed to investigate Home Place's non-conforming status or subpoena its business records. The Parish President testified that the Council's resolution to investigate and subpoena Bayou Fleet's business records is an unprecedented action which the Council is not empowered to take.

The court finds that Bayou Fleet has shown that it has been singled out for disparate treatment from others similarly situated.

The resolution implicates both a fundamental right and a nonsuspect class.

In filing this lawsuit, Bayou Fleet engaged in a "form of political expression" entitled to First and Fourteenth Amendment protection. In re Primus, 436 U.S. 412, 428, 98 S.Ct. 1893, 1902, 56 L.Ed.2d 417 (1978). This protection forbids the imposition of retaliatory sanctions designed to punish the legitimate exercise of First Amendment rights. Perry v. Sindermann, 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972); Hall v. Sutton, 755 F.2d 786, 787 (11th Cir. 1985); Muir v. Alabama Educational Television Comm., 688 F.2d 1033, 1037 (Sth Cir. 1982), cert. denied, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). A municipality, like any state governmental entity, may not retaliate against an individual because of that person's legitimate use of the courts. See Hall, 755 F.2d at 787.

The evidence shows that Bayou Fleet's sand pit has

been in continuous operation for many years. The evidence further shows that since Home Place lost the Ronald Adams' contract to Bayou Fleet, Council member Alexander has relentlessly attempted to prevent Bayou Fleet from operating its sand pit by challenging its non-conforming status, by opposing issuance of a permit from the Army Corps of Engineers, and by opposing issuance of a permit from the Levee District. He threatened the Levee District with withdrawal of $1.5 million in funding if they did not vote his way. After that, Alexander threatened Bayou Fleet's owner that he would "get him." He then attempted, unsuccessfully, to have the Council amend it agenda to address a proposed sales tax audit of Bayou Fleet and to stay any sand-pit permits. Bayou Fleet had no notice of this proposal. Bayou Fleet filed this lawsuit one week later. Two weeks after filing suit, Bayou Fleet received a tax audit notice, notwithstanding the Council's refusal to take up the issue at its July 7 meeting. At the next Council meeting, Alexander proposed the resolution at issue here. He also proposed that Home Place's attorney Joel Chaisson be appointed to investigate Bayou Flet. At no time did Alexander or the Council provide adequate notice to Bayou Fleet of the proposed resolution.

Of course, an official's dogged opposition to a particular company's operations does not in itself establish that the official's proposed enactments are based on federally impermissible considerations. In this case however, the record does not establish any legitimate basis for Alexander's actions.

There is no evidence before the court that Bayou Fleet's operations have caused any problems in the commu-

nity. Robin Durant's uncontradicted testimony establishes that the resolution was part of the scheme to eliminate Bayou Fleet's business so that Home Place would be the only sand pit in town. The court can discern no legitimate reason for this treatment. There is no evidence before the court that Bayou Fleet's operations have caused any problems in the community.

The resolution itself provides no compelling or rational basis for its enactment. The resolution acknowledges that the Parish Attorney rendered a legal opinion that Bayou Fleet has maintained its property's non-conforming status, yet concludes without explanation that a Special Legal Counsel should be hired and bestowed with subpoena power to conduct an investigation of Bayou Fleet's non-conforming status.

The evidence shows that the Parish Counsel conducted a thorough investigation of Bayou Fleet's property use, including examination of three years of documentation. The evidence supports the Parish Counsel's conclusion that Bayou Fleet did not lose its non-conforming status. The defendants offered no evidence or argument to show why another investigation through a specially appointed legal counsel is warranted.

The court finds based on the events leading up to the proposal of this resolution, that Bayou Fleet has been targeted for disparate treatment maliciously and arbitrarily designed to put Bayou Fleet out of business. The uncontested evidence of repeated failure to provide Bayou Fleet adequate notice of proceedings, Alexander's verbal threat to

the Levee District, his unsuccessful proposal for a sales tax audit immediately followed by a sales tax audit, and his proposal that Home Place's attorney be appointed as the Special Legal Counsel to investigate Bayou Fleet, support finding that the resolution was proposed in retaliation for the filing of this suit, and with a bad faith intent to injure Bayou Fleet.

Equal protection does not require government to treat all identically situated individuals identically, but prohibits unequal treatment which is solely the result of vindictiveness. Esmail, 53 F.3d at 179. "[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational, or plainly arbitrary." Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). Accordingly, the court finds neither a compelling nor a rational basis for the resolution. As a result, the court finds the resolution violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Accordingly, it is not necessary to address Bayou Fleet's other constitutional challenges.

3. Ultra Vires

The provisions of the Home Rule Charter do not permit the action taken by the Council to subpoena and investigate a business.

Article III, Section A (7)(c)(iv) provides that:

> Without limitation of the foregoing authority or other powers given to it by the Charter, the Council may:
>
> iv. Make investigation of Parish affairs and make

> inquiries into the conduct of any department, office, agency or special district of the Parish, including the investigation of the accounts, records and transactions of the department, office, agency or special district; and for the purpose of investigation, subpoena witnesses, administer oaths, take testimony and require the production of books, papers and other evidence; and any person who fails or refuses to obey any lawful order of the Council shall, upon conviction, be punished in such manner as the Council shall fix by ordinance.

Thus, the Council's authority to conduct investigations is limited to governmental matters, and does not include the power to investigate private individuals. Likewise, the acts authorized for enactment by resolution do not include the power to conduct investigations.

Article IV, Section H provides:

> An act of the Parish Council which is not to have the force of law may be enacted by resolution. Acts which may be adopted by resolution shall include but shall not be limited to one which:
>
> 1. Establishes a commemorative day, week, month or year;
>
> 2. Authorizes a person to sign or execute on behalf of the Parish Council a contract which has been previously approved;
>
> 3. Authorizes a person to execute, sign or countersign a check or draft on an account of the Parish Council;

4. Declares a statement of public policy of the Parish Council.

The appointment of a Special Counsel to conduct an investigation and subpoena Bayou Fleet's records is an act well-beyond the administrative and ministerial nature of the acts authorized to be enacted by resolution.

III. Conclusion

The court finds and declares that the ordinance is void for vagueness, and that the resolution violates the equal protection clause of the Fourteenth Amendment to the United States and was enacted without authority.

A declaratory judgment may give rise to injunctive relief in order to effectuate the remedy. 28 U.S.C. § 2202. Although this court may issue an injunction against the defendants and all officials who seek to enforce the unconstitutional provisions, the court will not entertain such a remedy at this time. Declaratory relief is a responsible alternative to the strong remedy of an injunction. The court anticipates that it will be respected. See Poe v. Gerstein , 417 U.S. 281, 94 S.Ct. 2247, 41 L.Ed.2d 70 (1974).

Accordingly,

IT IS ORDERED that the court hereby declares St. Charles Parish Ordinance No. 97-9-6 and St. Charles Parish Ordinance No. 4416 unconstitutional for the reasons set forth herein.

The plaintiffs' request for injunctive relief is hereby denied without prejudice.

New Orleans, Louisiana this 7th day of October, 1997.

/s/ Henry A. Mentz
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed SEP 29, 1999

BAYOU FLEET, INC.	CIVIL ACTION
VERSUS	NO. 97-2205
ELLIS A. ALEXANDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ST. CHARLES PARISH COUNCIL, ET AL.	SECTION "1" (1)

MEMORANDUM OPINION

Plaintiff Bayou Fleet, Inc. filed this action for monetary, injunctive, and declaratory relief alleging civil rights violations under 42 U.S.C. § 1983, antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 and 2, and state law violations of the Louisiana Unfair Trade Practices Act, La. Rev. Stat. ann. § 15:1401, et seq. Bayou Fleet named as defendants, Ellis Alexander, individually and as a member of the St. Charles Parish Council, St. Charles Parish, Coregis Insurance Company, Neal Clulee ("Clulee") and his wife Mary Clulee (referred to herein jointly as "the Clulees"), and two companies owned by the Clulees, Homeplace Batture

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Leasing, Inc. ("Homeplace") and NIC Materials, Inc.[1]

Bayou Fleet claims that Alexander and the Clulee defendants acted jointly and in conspiracy to put Bayou Fleet out of business through a series of arbitrary and capricious zoning challenges, permit challenges, and a sales tax audit which render them liable under section 1983 for violation of its rights to due process and equal protection of the law under the Fourteenth Amendment, and under the Sherman Act for conspiring and attempting to restrain trade and monopolize the river sand business. Bayou also claims that after it filed the present lawsuit, Alexander and the Clulee defendants continued to act jointly and in conspiracy to put Bayou Fleet out of business by adopting a criminal ordinance referred to herein as the "Levee Law," and the adoption of a resolution to appoint a "Special Legal Counsel" to determine whether Bayou Fleet had lost the non-conforming status of its property in violation of the same constitutional and statutory provisions above, as well as its First Amendment right of access to the courts. Bayou Fleet claims damages for loss of income due to delays in the permitting process allegedly caused by the conspirators, treble damages, attorney fees, and punitive damages.

After a trial on the merits of Bayou Fleet's request for a preliminary and permanent injunction, this court declared the Levee Law ordinance and the resolution to appoint Special Legal Counsel unconstitutional. See Bayou Fleet, Inc. v. Alexander, 1997 WL 625492 (E.D. La. Oct. 7, 1997).

[1] Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc. and N/C Materials, Inc. are referred to herein, in globo, as the "Clulee defendants."

The Parish Council subsequently voted to rescind the ordinance and resolution. Shortly before trial of the defendants' liability, Bayou Fleet settled its dispute with Alexander, St. Charles Parish, and Coregis Insurance Company. The remaining issues before the court are the liability of the Clulee defendants for the alleged violations of antitrust, civil rights, and state unfair trade practice laws and damages, if any.

FACTS

Plaintiff Bayou Fleet owns and operates sand pits located on the batture along the right descending bank of the Mississippi River in Hahnville, Louisiana, in St. Charles Parish. Bayou Fleet is a family-owned company represented at trial by one of the family members, Robin Durant.

Defendants Homeplace and NIC Materials are also family-owned companies in the sand pit business. Neal and Mary Clulee are the owners of Homeplace and NIC Materials. Homeplace owns a sand pit on the batture just down river from Bayou Fleet. Homeplace leases in part to NIC Materials, which handles the sales and trucking of the sand.

In 1981, Bayou Fleet's sand pit and the sand pit now owned by Homeplace were zoned B-1, which did not permit the operation of sand pits. Because both sand pits were in operation prior to the creation of that zoning classification, the sand pits were grandfathered to allow continued operations as a non-conforming use, provided that the sand pit activities were not suspended for a period of six months.

Bayou Fleet and the Clulee defendants are competitors in the sand business. They are the only active sand pit businesses in the greater Hahnville area. In between Bayou Fleet's and Homeplace's sand pits is a non-operating sand pit owned by the Giambelluca family. The sand pits are adjacent to residential areas of Hahnville. Two other sand pit businesses operate in the same market, but in the nearby town of Waggaman, Louisiana.

The Durants and the Clulees have a history of litigation over the years, as described below. The present controversy began in 1997 when Ronald Adams Contractors, Inc. ("RAC") obtained a Louisiana road construction contract which required a source of approximately 750,000 cubic yards of river sand for the job. The following is a chronology of the facts of what occurred when RAC undertook to acquire the sand.

RAC wanted to source its own sand by dredging the Mississippi River and stockpiling it in a sand pit. RAC sought quotes from Clulee and Durant to use their sand pits to stockpile the sand and haul out as needed for the project. RAC ultimately decided to use the Durant/Bayou Fleet sand pits.

In order to dredge sand from the Mississippi River, RAC had to obtain a permit from the U. S. Army Department Corps of Engineers. A permit is also needed from the Lafourche Basin Levee District Board of Commissioners (hereinafter "Levee Board") to operate a

sand pit, meaning pumping, stockpiling, and hauling sand across the levee. A permit to operate Bayou Fleet's sand pit was held by a company called Vulcan, which offered to name RAC as licensee. RAC declined because it wanted all permits in its own name. If the Levee Board denies a permit to operate, the Corps of Engineers is required by regulation to deny a permit to dredge.

RAC started the permitting process in March, 1997. By resolution adopted April 3, 1997, the Levee Board issued a permit to RAC to make improvements to the levee crossing to Bayou Fleet's sand pits. On April 4, 1997, RAC submitted an application to the Corps of Engineers for a permit to dredge the Mississippi River. About this same time, it became apparent that there were neighborhood concerns about the project. The Corps of Engineers' file shows a flurry of complaints during this period from residents opposing the RAC permit. The evidence established that sand pit operations in general can cause public health problems from air pollution and safety risks, as well as nuisances to neighbors.

Andrew Courreges, RAC's operations manager, and Durant met with Alexander at Durant's office to assure him that they would make a good effort to abate potential problems for the community. Durant told Alexander that his pit was in operation and permitted. Alexander indicated that he would support the project.

Telephone records show a one-minute phone call

from Clulee's home to Alexander's home on April 28, 1997.[2] Clulee recalls speaking with Alexander during this period about the status of Bayou Fleet's non-conforming use and the RAC permits. On approximately the same date, Alexander telephoned the Director of the Department of Planning & Zoning ("P & Z"), Earl Matherne, to advise him of his constituents' objection to the operation of Bayou Fleet's sand pits. He also advised Matherne that the residents were willing to testify that Bayou Fleet's sand pits had lost their non-conforming use because they had been shut-down for more than six months.

In response, Matherne advised RAC that it might have zoning problems with using Bayou Fleet's sand pits. On May 5, 1997, Matherne requested a legal opinion from Randy Lewis, Parish Attorney, regarding whether Bayou Fleet had lost it's nonconforming use by abandonment. Lewis investigated the issue, including reviewing documents voluntarily produced by Bayou Fleet, such as sales records and affidavits from truck haulers.

If Bayou Fleet had lost its non-conforming use, RAC would either have to use a different sand pit, or Bayou Fleet would have to try to get Bayou Fleet's property re-zoned.

On May 17, 1997, Courreges set up a meeting between himself, another RAC employee, and Clulee, to discuss purchasing sand from Homeplace's pit. They discussed

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[2] The court finds that none of the one-minute phone calls in this case involved any conversation, but show only that a call was made where an answering machine picked up.

the particulars of Clulee's bid. Courreges mentioned that he had received a letter in which Clulee questioned the project. Clulee explained that his only problem with the project was RAC's proposed dredging in front of his property. Courreges felt that Clulee seemed to have a lot of knowledge about the progress of RAC's permit applications. Clulee told Courreges that if RAC used his sand "he could keep local authorities 'satisfied' (sheriff's dept., weigh units, etc.) and "left the 'rest' unsaid if [RAC did] not use him."[3]

RAC decided to stick with Bayou Fleet.

On May 21, 1997, the Parish Attornev issued his opinion letter that Bayou Fleet had not lost its non-conforming use. Alexander disagreed with that opinion.

The St. Charles Parish Coastal Zone Advisory Committee (hereinafter nCZACII), an eight-member committee that makes recommendations to the Parish Council. on wetlands and environmentally- related permit applications within the Parish, had on its May 29, 1997 agenda, inter alia, the RAC permit application before the Corps of Engineers. The CZAC was to decide whether to recommend to the Parish Council that it submit a letter of objection or no objection to the Corps. Alexander prepared and mailed to everyone in the immediate area of the Bayou Fleet sand pits a notice of that meeting. The CZAC published an official notice as well.

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[3] The quoted language is from a sununary of the conversation made by Courreges on an RAC "Standard Conversation Form."

Bayou Fleet received a copy of Alexander's notice. Durant was surprised by it because his prior meeting with Alexander led him to believe that Alexander would support the RAC project.

Alexander asked Clulee to attend the CZAC hearing, but he could not attend, so Clulee had his attorney Joel T. Chaisson (a retired state district court judge), attend on behalf of Homeplace. Alexander, Chaisson, and seven members of the public spoke in opposition to the project, their main concerns being dust, noise, increased industrial traffic on a substandard roadway, and the sand pits, alleged loss of its non-conforming use. The citizens also presented a petition with forty signatures against "the reopening of sand pits in Hahnville." There is nothing unusual about members of the public or Parish Council members presenting their views at a CZAC meeting. CZAC meetings are televised. Durant did not attend the hearing.

Phone records establish that on the day of the CZAC hearing, there were two phone calls from Clulee's home to Alexander's home -- one for eight minutes and another for 12 minutes.

On May 30, 1997, the CZAC issued a recommendation to the Parish Council that a letter of no objection be issued to all concerned agencies.

On the same date, Mary Clulee wrote a letter on behalf of Homeplace to the Corps of Engineers objecting to RAC's permit application "on the basis that their proposed

dredging area extended the entire length of our property." She further stated: "I feel that there is enough dredging area in the immediate area frontage fill of their site."

At the regularly scheduled June 2, 1997 meeting of the Parish Council, Alexander introduced a resolution calling for the Parish to issue a letter of objection to the Corps of Engineers based on concerns of air pollution and its effects on persons with medical problems such as asthma and emphysema, industrial congestion, noise, and dangers to children playing in the unfenced sand pits.[4] Alternatively, the resolution requested the Corps. to stipulate conditions for issuance of the permit that would ease neighborhood concerns.[5] One of the alternative conditions was for the trucks to drive behind the levee and exit at Homeplace's ramp to avoid driving along the river road near the residential areas. Because no such road existed, Durant believed that this condition was a subterfuge to block the deal with RAC. This resolution in effect would reject the recommendation of the CZAC that the Parish issue a letter of no objection. The Parish Council voted with one dissent to adopt

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[4] A child had been killed at Bayou Fleet's property while tunneling into sand piles.

[5] Such as: limiting operations to daylight hours, requiring level truck loads and covered truck beds, limiting the height of the stockpiles to the height of the levee, wetting ramps three times a day, fencing the stockpile, installing asphalt ramps over the levee, lowering the speed limit to 25 mph, installation of truck crossing signs, requiring sand hauling trucks to access the pits by traveling behind the levee.

Alexander's resolution of objection. Durant attended this meeting; the Clulees did not.

After the May 29 CZAC meeting and prior to the June 2 Parish Council meeting, there were four phone calls from the Clulee's home to Alexander's home -- two for one minute each, one for nine minutes, and one for seven minutes -- for a total talk time of 16 minutes.

By letters dated June 4, 1997, Alexander forwarded the Parish Council's objection to Senators Mary Landrieu and John Breaux asking for their support of the citizens' opposition to the RAC permit application before the Corps of Engineers. Both Senators responded by asking the Corps of Engineers to provide them with information about the project.

By letters dated June 5 and 6, 1997, Alexander requested P & Z and Chris Tregre, the Parish President, to advise him of the status of Bayou Fleet's non-conforming use.

By letters dated June 5 and 6, 1997, Alexander informed the Levee Board of the Parish Council's resolution to object. Alexander requested the Levee Board to rescind its prior permit for RAC to make improvements to Bayou Fleet's levee crossing and to deny RAC's pending operations permit application based on the harmful impact of the proposed operations on the residential community.

After considering the opposition Alexander presented, the Levee Board voted on June 5, 1997, to deny RAC an

operations permit -- (a permit to pump, stockpile, load, and haul sand over the levee).[6] Alexander promptly informed the Corps of Engineers of the Levee Board's decision. Because the Levee Board's denial meant automatic denial of a dredging permit from the Corps of Engineers, RAC requested the Corps to postpone decision on his application until he had a chance to defend his permit application before the Levee Board.

In the meantime, Durant had a friend, who was a fraternity brother of U.S. Congressman Robert Livingston, write to the Congressman to help expedite the Corps of Engineers' permit process. Livingston did write a letter to the Corps on June 24, 1997, but later in September, 1997 (after the Corps had granted the permit) withdrew his letter as he realized that the matter was not within his district, but the district of Congressman William J. Tauzin.

RAC wrote to Homeplace/Mary Clulee on June 27, 1997, assuring her that it did not intend to dredge in front of Homeplace's property.

On July 1, 1997, RAC and Durant attended a second meeting of the Levee Board and obtained a reversal of its decision to deny the operation permit. Alexander was also present. After the meeting, Alexander and Durant had a heated exchange. Durant informed Alexander that he did not have any immunity for his actions before the Levee Board; Alexander replied: "I'm going to get you. The Clulees did not attend this meeting.

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[6] This operations permit was the same kind held by Vulcan which RAC chose not to operate under.

After the June 2, 1997 meeting of the Parish Council and prior to the July 1, 1997 meeting of the Levee Board, there were two phone calls from the Clulee's home to Alexander's home -- one for one minute and one for six minutes -- for a total talk time of six minutes.

On July 3, 1997, Mary Clulee wrote a second letter on behalf of Homeplace to the Corps of Engineers asking that RAC amend the drawings of its proposed dredging area in accordance with its letter to her that it would not dredge the area next to her property.

At the July 7, 1997 meeting of the Parish Council, Alexander proposed a resolution to have a sales tax audit performed on Bayou Fleet. The resolution was rejected.

Two days before that Parish Council meeting there was a six minute phone call from the Clulee's home to Alexander's home.

Bayou Fleet filed the present lawsuit on July 14, 1997.

Despite the Parish Council's rejection of Alexander's proposed sales tax audit resolution, Alexander spoke to the head of St. Charles Parish Tax Collection Department, R.J. Lorio, about Bayou Fleet's payment of sales taxes. On July 30, 1997, Lorio issued notice of a sales and use tax audit to Bayou Fleet. Bayou Fleet cooperated with the audit, which did not result in any citations for failure to pay taxes.

After the July 7, 1997 meeting of the Parish Council

and before the July 30, 1997 tax audit notice, there were two one-minute phone calls from the Clulee's home to Alexander's home.

The Corps of Engineers issued a dredging permit to RAC on July 21, 1997, under four months from the date of application. This would have been the last permit RAC needed to begin operations at Bayou Fleet, but P & Z in discussions with the Parish President, who was historically opposed to sand pit operations, raised questions about and ultimately determined that RAC would have to apply for a "Change of Occupancy" permit for the Bayou Fleet site. No one challenged this permit, which was issued on September 22, 1997. No more permits were required in order for RAC to begin operations.

There is no evidence that the Clulee defendants or Alexander played any role in P & Z's decision to require this permit or in the length of time it took to obtain the permit. The evidence that on August 15, 1997, an unsigned, form affidavit was telefaxed between the Chaisson and Chaisson law firm and Alexander's home does not show that the Clulee defendants or Alexander were involved in the Change of Occupancy permit. The affidavit related to the issue of Bayou Fleet's non-conforming use and was to be used by residents in the immediate area of the sand pits who believed that Bayou Fleet's sand pits had ceased operations for a period of time. No one ever signed the affidavit, nor is there any evidence that Alexander or the Clulee defendants

ever attempted to have any on sign the affidavit.[7]

Alexander introduced the Levee Law ordinance and the Special Legal Counsel resolution at the September 8, 1997 meeting of the Parish Council. The Levee Law would have made it a criminal offense for any person to cross over the levee without written permission of the Parish Council. The resolution acknowledged the opinion of the Parish Attorney that Bayou Fleet had maintained its non-conforming use, yet concluded without explanation that "it is in the best interest of the Parish Council and residents of St. Charles Parish to employ Special Legal Counsel to conduct a thorough investigation" of "whether or not Bayou Fleet has had a sand pit operation continuously for the past twelve months on property located on the Mississippi batture in Hahnville." The resolution empowered the Special Legal Counsel to "subpoena the business records of Bayou Fleet." Alexander requested that Joel Chaisson, counsel for Homeplace, be selected to serve as Special Legal Counsel.

Notice of these proposed acts was published in the local newspaper. The notice of the Special Legal Counsel resolution did not mention that it was directed at Bayou Fleet. Bayou Fleet did not have adequate notice of the proposed resolution. Neither Bayou Fleet, nor the Clulee defendants attended the September 8, 1997 Parish Council meeting.

The Parish Council voted to adopt both the ordinance and the resolution, but the decision as to whom to

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[7] The affidavit was the second page of the fax transmission. Alexander was not able to produce the first page of the fax in discovery, Typically, the first page of a telefax is a cover sheet with only the name of the sender, the sender's fax number, and the number of pages telefaxed. For this reason and because the affidavit was never used, the court rejects

appoint as Special Legal Counsel was deferred pending receipt of a contract.

Parish President Chris Tregre vetoed both measures on September 11, 1997 because he believed the Parish Council had acted beyond its authority. On September 27, 1997, the Parish Council voted to override the vetoes, however, the acts never became law. After this court declared the acts unconstitutional, the Parish Council voted to rescind them.

After the July 30 tax audit letter and prior to the September 8, 1997 meeting of the Parish Council, there were 5 phone calls from the Clulees' home to Alexander's home -- 4 one-minute calls and one 18 minute call -- for a total talk time of 18 minutes. Between September 8, 1997 and the September 22, 1997 override vote, there were three phone calls from the Clulees' home to Alexander's home -- each for one minute.

RAC wanted to place a small 6 by 6 foot guard house on the property, which required a permit. The pendency of this permit application did not prevent RAC from dredging and stockpiling sand. There is no evidence that anyone challenged the issuance of this permit; however, P & Z did request an opinion from the Parish Attorney as to whether the shack would present an expansion of the non-conforming use. There is no evidence that the Clulee defendants or Alexander played any role in this permit process. Once the Parish Attorney issued his opinion that it would have no effect on their non-conforming use, and the Fire Marshall approved the structure, P & Z issued RAC a permit on October 16, 1997 to install the guard shack.

(footnote 7 continued) Bayou Fleet's argument that the absence of the first page should create an adverse inference against the Clulee defendants.

RAC competed its project on time. The evidence establishes that it took RAC approximately 110 days to obtain the Corps of Engineers' permit, and approximately six months to obtain all permits necessary to commence operations. In comparison, when Homeplace applied for the same kind of dredging permit from the Corps of Engineers in January, 1998, it took over ten months to obtain the permit, notwithstanding that the Parish Council unanimously adopted a resolution to issue a letter of no objection.[8] Even considering the evidence that for two to three months the Clulees delayed the process by failing to take any action on their permit application, RAC's dredging permit application was approved in far less time.

Neal Clulee made a total of 46 telephone calls from his home to Alexander's home in 1997. The 1997 phone calls commenced on April 28, 1997, admittedly because of RAC's permit applications before the Corps of Engineers and the Levee Board, and continued until December 30, 1997. Twenty-eight of the 46 calls were one minute calls with no conversation. Prior to this lawsuit being filed, the records show seven phone conversations totaling 58 minutes between Clulee and Alexander.

Clulee did not recall specific phone conversations. He admitted discussing the RAC permits and his belief that Bayou Fleet had lost its non-conforming use. He explained that several calls were unrelated to Bayou Fleet and involved matters such as resident complaints about his business operations, a diversion project in St. Charles Parish, and the asphalt ramp the Parish required him to install. Clulee

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[8] Alexander abstained from voting.

recalled speaking with Alexander on other occasions about the sand pit business in general. Alexander was trying to educate himself about the operations and the permitting process. Clulee thinks most of the phone calls were made as a result of the lawsuit being filed against him and Alexander. Indeed, there were only 15 phone calls totaling 58 minutes prior to the lawsuit being filed; whereas there were 31 phone calls totaling three hours and five minutes after the lawsuit was filed. Some of the calls Clulee made were to return calls initiated by Alexander to Clulee's beeper.

In addition to these permit and legislative processes, the court considers the parties' following history of litigation as relevant to the claims herein.

In the 1984, one of the Durant family companies sued Clulee personally to collect a debt and obtained a judgment in excess of $100,000. Durant's company filed a lien on Clulee's property and the sheriff foreclosed on Clulee's home. Durant's company purchased Clulee's home at the sale.

Also, in 1984, a dispute arose regarding the non-conforming use of the Clulees' sand pit. Both Chris Tregre, a Parish Council member at the time and now Parish President, and the Durant family, tried to stop the pit operations on the ground that the nonconforming use had been abandoned for five years. Tregre was acting pursuant to his constituents' opposition. Tregre attended hearings to voice his opposition and spoke to the parish president about it. No legislative acts such as the resolutions and ordinance at issue here were proposed.

Another sand pit feud began in 1989 between the Clulees and the Giambellucas, who owned the pit in

between Bayou Fleet and Homeplace. The court takes judicial notice of the facts of that dispute as set forth in *Giambelluca v. Parish of St. Charles*, 687 So.2d 423 (La. App. 5th Cir. 1996). Briefly, the dispute centered around the use of a levee ramp that was the only access to the Giambelluca property. After two lawsuits, one of which was presided over by Joel Chaisson (now Homeplace's attorney), who ruled in favor of the Clulees, a Parish ordinance sponsored at the request of Clulee by Alexander, and destruction of the ramp by Clulee, the Giambelluca property was left without road access and was forced out of business. The Giambelluca sand pit has been out of business ever since Clulee had the ramp torn up, leaving Homeplace and Bayou Fleet as the only sand pits operating in Hahnville.

Another sand pit lawsuit was brought by one of the Durant family companies, LA Materials, to have the Clulee sand pit closed based on loss of non-conforming use. LA Materials withdrew the suit when the operating company, Westside Sand, claimed that LA Materials was trying to monopolize the sand business.

Bayou Fleet urges the court to impose an adverse inference against the defendants because Mary Clulee, a will call witness for the defense, did not testify. The Fifth Circuit has described the adverse witness rule as an "archaism" for which there is no longer any justification, particularly where the witness could have been called by either party, as in the present case. See Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1048-49 (5th Cir. 1990). In any event, the adverse witness rule is discretionary. See Evangeline Refining Co. v. Charles N. Wooten, Ltd., 890 F.2d 1312, 1320 (5th Cir.

1989). The court finds that Mary Clulee's testimony would have offered no information that the court did not already have before it. Her testimony likely would have been cumulative to her husband's testimony. Moreover, the evidence from all the witnesses failed to show that she was personally involved in any of the alleged violations. See id. (quoting II J. Chadbourne, *Wigmore on Evidence* § 287) Mary Clulee was present during the entire trial, and Bayou Fleet could have called her as a witness. Finally, the court notes that Bayou Fleet did not raise this issue at trial. Under the circumstances of this case, the court declines to invoke the adverse witness rule.

ANALYSIS

A. Noerr-Pennington Doctrine

The Clulee defendants contend that they are immune from liability pursuant to the Noerr-Pennington doctrine.[9] See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed.2d 464 (1961): United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). The doctrine, which was developed by the Supreme Court in the

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9 The court may consider the Noerr-Pennington doctrine with respect to the liability of the Clulee defendants even though they did not assert the doctrine in their answer. The court raised the issue sua sponte a few weeks prior to trial and ordered the parties to brief the issue. The Clulee defendants then included the issue in the pre-trial order, over Bayou Fleet's objection. It has been held that the Noerr-Pennington doctrine is not an affirmative defense in the sense that it is the plaintiff's burden to prove the substantive violation claimed, which cannot be done where the defendant's allegedly wrongful conduct consists of petitioning the

context of antitrust law, has its underpinnings in First Amendment principles that the right to petition the government legislatively, judicially, or administratively is constitutionally protected speech regardless of its motivation. Noerr, 365 U.S. at 138, 81 S. Ct. at 530; Pennington, 381 U.S. at 669-70, 85 St. Ct. at 1593. "The essence of the doctrine is that parties who petition the government for government action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." Video Int'l Production v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988), cert. denied, 491 U.S. 906, 109 S.Ct. 3189, 105 L.Ed.2d 697 (1989).

Although the Noerr-Pennington doctrine was originally applied in the antitrust context, it has been applied to protect First Amendment petitioning of the government from claims brought under federal and state laws, including section 1983. Id. at 1084. See e.g., Gorman Towers, Inc. V. Bocloslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (section 1983) (landowners, secret meetings with city officials and

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Footnote 9 cont. ...government. See PrimeTime 24 Joint Venture v. National Broadcasting Co., Inc., 21 F. Supp. 2d 350, 355 (S.D.N.Y. 1998)(citing 1 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 207c (rev. ed. 1997)); See also McGuire Oil Co. v. Mapco, Inc., 958 F.2d.1552, 1558 n. 9 (11th Cir. 1992) (Citing Areeda and H. Hovenkamp). Certainly, there would be no justification for the court to reject application of the doctrine on a procedural error, where to do so would abridge the defendant's First Amendment rights. Here, where Bayou Fleet was given adequate advance notice of the court's intent to consider the issue, and where the doctrine was asserted in the pre-trial order, it is appropriate to consider the Noerr-Pennington doctrine as it may apply in this case.

petitioning for enactment of city ordinance to rezone plaintiff's property) (citing Sawmill Products, Inc. v. Town of Cicero, 477 F.Supp. 636, 642 (N.D.Ill. 1979) (section 1983) (protesting presence of plaintiff's sawmill which was then shut down by town ordinance) ; Weiss v. Willow Tree Civic Ass'n, 467 F.Supp. 803, 816-18 (S.D.N.Y. 1979) (section 1983) (lobbying town officials and filing groundless judicial and administrative complaints to oppose zoning permit); Aknin v. Phillips, 404 F.Supp. 1150, 1153 (S.D.N.Y. 1975), aff'd, 538 F.2d 307 (2d Cir. 1976) (section 1983) (urging officials to enforce unconstitutionally vague noise ordinance against plaintiff's discotheque); Sierra Club v. Butz, 349 F.Supp. 934, 938-39 (N.D.Cal. 1972) (contractual interference) (filing lawsuit and administrative appeals to halt plaintiff's logging operation; filings constitutionally privileged even if motivated by malice)). Bayou Fleet's claims under section 1983 and the LUTPA are all based on the same events as the antitrust claims.

Bayou Fleet has accused the Clulee defendants of lobbying and influencing state and federal officials in private meetings, telephone calls, letters, and public hearings to deny permits, revoke Bayou Fleet's non-conforming use, and enact ordinances and resolutions, all designed to put Bayou Fleet out of business. Pursuit of that goal using the administrative and legislative channels and procedures that the Clulee defendants did was within their First Amendment rights. Their actions are nothing more than protected First Amendment activity to procure favorable government actions. They have the right to advance their opinions to government officials about Bayou Fleet's or RAC's business, whatever the underlying motive. Indeed, Bayou Fleet and other Durant family companies have pursued similar actions

against the Clulees such as filing objections to permits and a lawsuit to declare a loss of non-conforming use. Bayou Fleet made lobbying efforts of its own. Bayou Fleet had private meetings with Alexander to get his support for the project; it garnered support from a United States Congressman. This is traditional political activity. The First Amendment protects "attempts to influence the passage or enforcement of laws," no matter how harmful their incidental impact may be. Noerr, 365 U.S. at 135, 81 S.Ct. at 528.

The sham exception to the Noerr-Pennington doctrine does not apply in this case. That exception applies when a defendant uses "the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon." City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991). Here, the Clulee defendants genuinely sought to achieve the governmental measures for which they lobbied. The sham exception does not apply to them because their actions were designed to achieve the outcome of the processes they used.[10] Therefore, the petitioning of

[10] Bayou Fleet alleged but did not prove that the Clulee defendants abused the legislative process by bribing Alexander. There was some testimony that council members heard rumors that Clulee had bribed Alexander, but none of the witnesses were able to recall any specific details such as from whom they had heard the rumor. Because of the unreliability and prejudicial nature of this hearsay evidence, the court denied Bayou Fleet's motion to introduce this evidence under Federal Rule of Evidence 807. The court did allow the evidence as a proffer. Even if the court were to have admitted the evidence, the court finds that it would not carry any probative value because of its vagueness and unreliability. Furthermore, to the extent that Bayou Fleet contends that a corrupt or illegal conspiracy existed, the Noerr-Pennington doctrine does not recognize a conspiracy exception. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. at 382-83, 111 S.Ct. at 1355-56.

Alexander, the Parish Council, the CZAC, and the Corps of Engineers was not a sham. See Allied Tube & Conduit Corp) v. Indian Head, Inc., 486 U.S. 492, 500 n.4, 108 S.Ct. 1931, 1937 n. 4, 100 L. Ed. 2d 497 (1988) . Accordingly, the court finds that the Clulee defendants have no liability under the antitrust laws, section 1983, or the LUTPA because they are protected by the Noerr-Pennington doctrine.

As alternative reasons for absolving the Clulee defendants of any liability in this case, the court finds that the evidence fails to establish essential elements of the section 1983 and antitrust claims.

B. Section 1983

In a section 1983 action the plaintiff must establish two essential elements: (1) that the conduct in question deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under color of state law. See 42 U.S.C. § 1983; Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

The Clulee defendants are private persons who do not occupy positions that can be considered actors "under color of state law." A private person may be considered a state actor under color of state law if the individual is engaged in a conspiracy or willfully engages in joint activity with one or more parties acting under color of state law, even if the state agent is immune to liability. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1065, 26 L.Ed. 2d 142 (1970); Cinel v. Connick, 15 F. 3d 1338, 1343 (5th

Cir. 1994), cert. denied , 513 U.S. 868, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994). In this case, the state official whose actions are implicated is Alexander. The parties stipulated that all of Alexander's actions were under color of state law.

A civil conspiracy under section 1983 is an agreement between private and public actors to violate the plaintiff's constitutional rights. Cinel, 15 F.3d at 1343. A conspiracy may be proven by circumstantial evidence, Mack v. Newton, 737 F.2d 1343 (5th Cir. 1984) ; however, the acts of the alleged conspirators must show a "unity of purpose, common design, and understanding, or meeting of the minds in an unlawful arrangement." Hale v. Townley, 19 F.3d 1068, 1075 (5th Cir. 1994)(citing American Tobacco Co. v. U.S., 328 U.S. 781, 66 S.Ct. 1125 (1946)).

"The joint action inquiry focuses on whether the state has 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity ... ' Gorenc v. Salt River Project Agric. Improvement and Power Dist. , 869 F.2d 503, 507 (9th Cir. 1989) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L. Ed. 2d 45 (1961)) . "A private party does not act under color of state law when [he] merely elicits but does not join in an exercise of official authority." Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 388 (5th Cir. 1985) , cert. denied, 486 U.S. 848, 109 S.Ct. 129, 102 L.Ed.2d 102 (1988). "It is not sufficient to allege that the [private and state] defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves towards an unconstitutional action by virtue of a mutual understanding. Even were such allegations

to be made, they must further be supported by some factual allegations suggesting such a 'meeting of the minds'." See Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206 (7th Cir. 1980).

Initially, it must be noted that there is scant evidence of personal involvement on the part of Mary Clulee, Homeplace, and N/C Materials. Under section 1983 there can be no liability, much less a conspiracy between individuals that had no personal involvement in the allegedly wrongful conduct. See Murphy v. Kellar, 950 F.2d 290, 292 (5th Cir. 1992); Jacques v. Procunier, 801 F.2d 789, 793 (5th Cir. 1986). Individual liability under section 1983 must rest on facts reflecting the defendant's personal participation or involvement in the alleged wrong. The only evidence regarding Mary Clulee is two letters she wrote on behalf of Homeplace to the Corps of Engineers objecting to the permit because of proposed dredging in front of her property. Her letters show that she was not trying to prevent issuance of a permit insofar as dredging in front of Bayou Fleet's property, but only dredging that might occur in front of her property. This evidence does not come close to establishing a conspiracy or joint action between her and Alexander. The only other evidence specifically regarding Homeplace is its appearance at the CZAC meeting through an attorney to voice its objection to RAC's Corps of Engineers' permit. As for N/C Materials, the only evidence of action taken directly by it is the quote for sand it gave to RAC. This evidence is simply insufficient to establish a conspiracy between Homeplace and/or N/C Materials and Alexander. See also Scutieri v. Estate of Revitz, 683 F.Supp. 795, 800-01 (S.D. Fla. 1988) (a private corporation is not vicariously liable under § 1983 unless a policy-making individual takes action

constituting "official policy" of the corporation).

Both Alexander and Clulee specifically denied the existence of a conspiracy. Alexander indicated repeatedly at hearings and in his letters that his motives were to represent his constituents who had health and safety concerns about the sand pit operations. The evidence established that there are legitimate community concerns about sand pit operations.[11] Based on those concerns, the council members are historically opposed to sand pit operations. Clulee admitted that he was motivated by a belief that Bayou Fleet had lost its non-conforming use and by concern that there might be dredging in front of his property, both obviously matters of self-interest rather than community concerns. The fact that Alexander and Clulee wanted the same objective, that is, to prevent sand pit operations at Bayou Fleet, does not establish an agreement or joint action to put Bayou Fleet out of business by unconstitutional means.

Bayou Fleet places great emphasis on the telephone communications between Clulee and Alexander. As discussed above, private communications between a political representative and his constituent are legitimate. The First Amendment envisions interactions between political representatives and their constituents. There are no limits on how many times one can telephone a public official. Even so, in

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11 In the prior opinion rendered by this court, the court noted that there was no evidence presented at the hearing on the permanent injunction that Bayou Fleet's or any other sand pit's operations caused problems in the community. See Bayou Fleet, 1997 WL 625492 * 8. Such evidence was presented at the trial on the merits of plaintiff's claims.

the court's opinion, the evidence does not show an unusual number or length of telephone conversations, considering that Alexander and Clulee were in legitimate cooperation with each other regarding RAC's permit applications, that Clulee had information about the technical permit process that would be helpful to Alexander, and that they had other legitimate matters to discuss, such as this lawsuit.

The evidence fails to establish that the Clulee defendants had any involvement in the Parish Attorney's investigation of the status of Bayou Fleet's non-conforming use, in the letter writing campaign that Alexander undertook to various political representatives and agencies, in the sales tax audit, the Levee Law ordinance, the Special Legal Counsel resolution, the requirement of a Change of Occupancy permit, the requirement of a permit to install the guard shack, or any delays associated with those two permits.

Having found insufficient evidence of a conspiracy or joint action to equate the Clulee defendants' conduct with state action, any conduct of Alexander that violated Bayou Fleet's constitutional rights is not actionable under § 1983 as to the Clulee defendants.[12] See Scott v. Greenville County, 716 F.2d 1409, 1424 (4th Cir.1983) (recognizing that

[12] In the prior opinion rendered by this court, it was stated: "Robin Durant's uncontradicted testimony establishes that the resolution was part of a scheme to eliminate Bayou Fleet's business so that Home Place would be the only sand pit in town." See id. Neither the Clulees nor Alexander testified at that prior hearing. Furthermore, the court's conclusion herein, that there is no evidence of a conspiracy or joint action between the Clulee defendants and Alexander to put Bayou Fleet out of business by a unconstitutional means is not inconsistent with the court's prior statement.

"even overtly biased citizens who write letters, speak up at public meetings, or even express their prejudices in private meetings with public officials without formulating a joint plan of action are not 'conspiring' with those officials in a way that subjects them to § 1983 liability").

C. Sherman Act, Sections 1 and 2

Bayou Fleet's antitrust claims are based on sections 1 and 2 of the Sherman Act, 15 U.S.C.§§ 1 and 2. In order to state a claim for violation of § 1 of the Sherman Act, a plaintiff must allege (1) concerted action by two or more persons, (2) that unreasonably restrains interstate or foreign trade or commerce.

The evidence failed to show an unreasonable restraint of interstate trade. The permits RAC needed to begin its pit operations were issued without any delays beyond those normally encountered in the process. Even assuming that there were delays, there is no evidence that the delay impacted interstate trade.

A violation of section 2 of the Sherman Act is established when the plaintiff shows that the asserted violator: (1) has antitrust standing; (2) possesses or intends to possess monopoly power in the relevant market and (3) acquired or maintained that power or intends to do the same in a wilful manner. Aspen Skiing Co. v. Aspen Highlands, 472 U.S. 585, 105 S.Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985) ; United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

The evidence failed to show that Bayou Fleet suffered an antitrust injury, which is a component of antitrust standing. See Bell v. Dow Chemical Co., 847 F. 2d 1179, 1182 (5th Cir. 1988). Bayou Fleet did not prove that the conduct of the Clulee defendants had any anticompetitive effect. RAC obtained all of the permits it sought. The evidence showed that the alleged delay in the permit process was not any longer than with other applications. And, even if there had been an unreasonable delay, there is no evidence that the delay had an anticompetitive effect. Even assuming that the Clulee defendants played a wrongful role in passage of the Levee Law ordinance and the Special Legal Counsel resolution, (a fact which the evidence failed to prove), those acts were declared unconstitutional and rescinded before they took effect.

Accordingly,

IT IS ORDERED that judgment be entered in favor of defendants Neal Clulee, Mary Clulee, Homeplace Batture Leasing, Inc., and N/C Materials, Inc. and against plaintiff Bayou Fleet, Inc., dismissing plaintiff's claims with prejudice, plaintiff to bear costs.

New Orleans, Louisiana this 29th day of September, 1999.

HARRY A. MENTZ, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 1 2001
OFFICE OF THE CLERK

(3)

No. 00-1068

IN THE

Supreme Court of the United States

BAYOU FLEET, INC.,

Petitioner,

v.

HOME PLACE BATTURE LEASING, INC.,
NEAL CLULEE, MARY CLULEE,
and N/C MATERIALS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent, Home Place Batture Leasing, Inc., or N/C Materials, Inc., has a parent company and no publicly held company owns 10% or more of the stock of either such respondent.

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STATEMENT OF THE CASE

This litigation grew out of a zoning dispute. The facts are summarized here; the trial court's opinion sets forth considerably more detail. *Bayou Fleet v. Alexander*, 68 F. Supp. 2d 734 (E.D. La. 1999), reproduced at petition for certiorari appendix p. 45.

Bayou Fleet operates a commercial sand pit in a residential area in St. Charles Parish, Louisiana.[1] In spring 1997, Bayou Fleet wanted to undertake a large job which would have involved a considerable increase in traffic to and from its pit. Local residents complained and circulated a petition opposing this undertaking.

A public controversy developed and a St. Charles Parish council member, Ellis Alexander, asked for a public hearing to determine whether Bayou Fleet's sand pit operation was properly zoned. The dispute became acrimonious and, after a lot of pulling and tugging, Bayou Fleet

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1. Mississippi River sand is useful for construction. To meet the demand for sand, "sand pit" operators such as Bayou Fleet dredge the Mississippi River, pump the sand into large open pits adjacent to the river, and then sell the sand to construction companies. The purchasers haul the sand away in trucks.

Since Bayou Fleet's sand pit is located in a residential area, Bayou Fleet can operate only as long as Bayou Fleet maintains "grandfather status": a nonconforming use is "grandfathered" if the use predated the enactment of the restrictive zoning code provisions. Local residents contend that Bayou Fleet lost "grandfather status" by closing the pit for more than six months, hence Bayou Fleet should not be allowed to reopen.

sued Mr. Alexander contending that Mr. Alexander's actions violated 42 U.S.C. § 1983 and were otherwise wrongful.[2]

Shortly after the suit was filed, Mr. Alexander persuaded the St. Charles Parish council to enact two ordinances which were detrimental to Bayou Fleet. The timing and circumstances were such as to suggest that Mr. Alexander was motivated, at least in part, by a desire to retaliate against Bayou Fleet for suing him.

Bayou Fleet amended its lawsuit. In the amendment, Bayou Fleet added St. Charles Parish as defendant, contended that the ordinances were unconstitutional, and sought an injunction against their enforcement. The trial court held a hearing on the injunction request and found the ordinances unconstitutional. *Bayou Fleet v. Alexander*, 1997 WL 625492 (E.D. La. 1997), reproduced at petition for certiorari appendix p. 24.

It should be noted that the amended complaint was filed on September 23 and the injunction hearing was held on September 30. Thus, the defendants had less than seven days to marshall evidence.

The trial court's ruling left Bayou Fleet's damage claim to be resolved. Ellis Alexander, claiming immunity, filed a motion for summary judgment and the trial court granted

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2. Bayou Fleet originally claimed violations of 42 U.S.C. § 1983, the Sherman Act, and the Louisiana Unfair Trade Practices Act (LUPTA). Bayou Fleet also named the Clulees (respondents here) as defendants.

On appeal, Bayou Fleet abandoned the Sherman Act and LUPTA claims. Thus, the § 1983 claim is the only matter still in dispute.

the motion. *Bayou Fleet v. Alexander*, 26 F. Supp. 2d 894 (1998). The Parish settled with Bayou Fleet for an amount substantially in excess of Bayou Fleet's claimed damages.[3]

This disposed of the lawsuit except insofar as it pertained to the Clulees.

The Clulees, through their corporations N/C Materials and Homeplace Batture, operate a sand pit near Bayou Fleet's and, thus, are business competitors of Bayou Fleet. The Clulees played a minimal role in the public debate over Bayou Fleet's zoning. However, Bayou Fleet contended (and still contends) that the Clulees communicated privately with Mr. Alexander and persuaded him to act. For example, Bayou Fleet contends that Neal Clulee telephoned Mr. Alexander and prompted him to propose the two ordinances which were eventually declared unconstitutional. Therefore, in Bayou Fleet's view, the Clulees should be held responsible for Mr. Alexander's actions and for the Parish council's decision to enact the two ordinances.[4]

The Clulees hotly deny any involvement in Bayou Fleet's difficulties. The Clulees contend that Bayou Fleet filed

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3. Bayou Fleet claimed damages of $20,013.22. The Parish paid $35,000 in settlement.

4. As noted above, Bayou Fleet claims to have sustained actual damages in the amount of $20,013.22 and the Parish settled for $35,000. Thus, Bayou Fleet has already received, in settlement, an amount substantially in excess of its actual damages. Thus, Bayou Fleet does not claim actual damages from the Clulees. What Bayou Fleet wants from the Clulees is one million dollars in punitive damages ($1,000,000).

the federal lawsuit in an effort to intimidate its critics and prevent a public hearing on the zoning dispute. The Clulees counterattacked by filing two state court lawsuits, one for malicious prosecution and the other seeking a public hearing to determine whether Bayou Fleet's sand pit business is properly zoned. These lawsuits are still pending in state court (proceedings were stayed until after the conclusion of the federal trial).[5]

After a trial on the merits, the trial court credited the testimony of the Clulees' witnesses and held that Bayou Fleet had not proved that the Clulees were involved in Mr. Alexander's actions (68 F. Supp. 2d at 744 and 746, petition for certiorari appendix pages 67, 71):

> [T]he court finds that the evidence fails to establish essential elements of the section 1983 and antitrust claims . . . The evidence fails to establish that the Clulee defendants had any involvement in the Parish attorney's investigation of the status of Bayou Fleet's non-conforming use, in the letter writing campaign that Alexander undertook to various political representatives and agencies, in the sales tax audit, the Levee Law ordinance, the Special Legal Counsel resolution,

5. The Clulees infer that Bayou Fleet's decision to file an application for certiorari with this Honorable Court was motivated, in part, by a determination to delay the state court litigation as long as possible. The titles and docket numbers of the two cases are: *Clulee v. Bayou Fleet, et al.*, number 49,963C on the docket of the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana; *Clulee v. Tregre, et al.*, number 50,906C on the docket of the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana.

> the requirement of a Change of Occupancy Permit, the requirement of a permit to install the guard shack, or any delays associated with those two permits . . . Having found insufficient evidence of a conspiracy or joint action to equate the Clulee defendants' conduct with state action, any conduct of Alexander that violated Bayou Fleet's constitutional rights is not actionable under § 1983 as to the Clulee defendants.

The court added that, to the extent that the court's fact findings after trial on the merits might appear to differ from the findings made after the injunction hearing, this was explained by the fact that, at trial, the court had heard new evidence which was not presented at the injunction hearing (footnote 11, 68 F. Supp. 2d at 746, petition for certiorari appendix p. 70; footnote 12, 68 F. Supp. 2d at 747, petition for certiorari appendix p. 71):

> In the prior opinion rendered by this court, the court noted that there was no evidence presented at the hearing on the permanent injunction that Bayou Fleet's or any other sand pit's operations caused problems in the community . . . such evidence was presented at the trial on the merits of plaintiff's claims . . . Neither the Clulees nor Alexander testified at that prior hearing . . .

As an alternative ground for its holding, the trial court found that, even if the Clulees had done everything Bayou Fleet alleged, nevertheless the Clulees would not be liable because their (alleged) actions are protected under the Noerr-Pennington doctrine.

Here, it is important to note that the district court cited two alternative and independent grounds for decision, either of which would, alone, be sufficient to justify a judgment in favor of the Clulees. Thus, to obtain reversal, Bayou Fleet would be forced to demonstrate two things:

(1) the district court's fact findings are clearly erroneous; *and, also,*

(2) the Clulees' (alleged) actions are not protected under Noerr-Pennington.

The evidence presented at trial is set forth in detail in the trial court's opinion. As a review of this portion of the opinion will make clear, there was ample evidence to support the trial court's conclusions and, therefore, there is no rational basis for arguing that the trial court's fact findings are clearly erroneous.

On the face of it, Bayou Fleet's appeal was hopeless from the start.

In an attempt to avoid this trap, Bayou Fleet chose an unpleasant tactic. Instead of arguing that the trial court's fact findings were clearly erroneous[6], Bayou Fleet made a personal attack on the trial judge: Bayou Fleet argued that the fact findings should be set aside because the trial judge had acted as a mere figurehead and had allowed the law clerk to preside over the trial, thus violating Bayou Fleet's First Amendment right of access to the court (Bayou Fleet was

6. Bayou Fleet did argue "clear error" at the tail-end of its appellate brief (Bayou Fleet's Issue 6 on appeal), but this was not the primary avenue of attack.

forced to ask for a "plain error" review of this argument, since, at the trial level, Bayou Fleet never made any objection to any aspect of the district judge's trial management).

The Fifth Circuit affirmed the decision of the trial court. *Bayou Fleet v. Alexander,* 234 F.3d 852 (5th Cir. 2000). With regard to the issue of the trial judge's behavior, the appellate panel stated (234 F.3d at 858, petition for certiorari appendix p. 12):

> Our review of the record persuades us that Bayou Fleet was not denied meaningful access to the courts. The judge was engaged in the pretrial stage and the trial itself. He questioned both witnesses and lawyers during the trial, ruled on the evidence, and made those decisions that were necessary for a traditional trial.

The appellate panel also analyzed the Noerr-Pennington issue at some length and concluded that the trial court was correct in determining that the actions allegedly taken by the Clulees were within the scope of Noerr-Pennington.

The decision to affirm was unanimous.

This Honorable Court's Rule 15.2 requires your respondents to identify any perceived misstatements made in the petition for certiorari. Your respondents find it somewhat difficult to separately identify each and every misstatement, as the petition for certiorari is drafted in such a fashion as to state, or imply, that Bayou Fleet's allegations of conspiracy are accurate, even though the trial court expressly found that these allegations were unsupported by the evidence.

Furthermore, Bayou Fleet repeatedly references the preliminary fact findings contained in the trial court's opinion on the injunction as though these were the controlling fact findings in the case, even though the trial court qualified and modified these fact findings after trial on the merits.

Thus, Bayou Fleet's description of events is inaccurate in most important respects. Specific examples of inaccuracy include the following:

(1) petition page 3 footnote 2: "Bayou Fleet amended its lawsuit an additional time to add the Clulees' other company, N/C Materials, Inc., as a defendant when it discovered that they had involved it in the conspiracy." This statement assumes the existence of a conspiracy, as well as the existence of evidence demonstrating the involvement of N/C Materials, Inc., in spite of the fact that the trial court found, as a matter of fact, that the Clulees were not involved in any conspiracy and that N/C Materials was not involved in any conspiracy.

(2) petition page 4 paragraph 2 (variations of this statement are repeated several times in the petition for certiorari): "The district court ruled that Bayou Fleet's property had maintained its non-conforming status." Actually, as the district court explained at the time of modifying the consent judgment, and as the Fifth Circuit also explained in connection with its analysis of Bayou Fleet's arguments relating to the consent judgment, the district court did NOT rule that Bayou Fleet's property had maintained its non-conforming status. The district court expressly avoided ruling on this issue and, instead, left the matter to be resolved in state court. The district court modified the consent judgment to ensure that the events in federal court would not be treated as res judicata of the zoning issue.

(3) petition page 8 paragraph 2: "The petitioner's First Amendment right of access to the courts has been trumped by the respondents' First Amendment right to petition the government." This statement assumes that the lower courts found that respondents violated petitioner's right of access, and that the lower courts excused respondents' wrongful actions because of excessive concern over respondents' right to petition. Again, the trial court found that, as a matter of fact, that the Clulees did NOT retaliate against Bayou Fleet. Therefore, there was no need to weigh the right of access against the right to petition.

(4) petition page 11 paragraph 2: "Whether Noerr-Pennington immunity should protect a defendant who retaliates . . ." This statement assumes that the defendants have retaliated. Again, the trial courts' fact findings were that the Clulees did NOT retaliate.

(5) petition pages 18, *et seq.* The petitioner offers a dramatic description of the alleged emotions of Bayou Fleet's president and major shareholder, Robin Durant, on witnessing the alleged misconduct of the trial judge and the trial judge's law clerk (e.g., "the client was amazed" at page 19; "Mr. Durant and Bayou Fleet were stunned" at page 21). This is completely unsupported by anything in the record. At trial, Bayou Fleet raised no objection to the trial judge's management of the case (hence the necessity for requesting a plain error review). Robin Durant did not offer an affidavit, a deposition, or even an unsworn statement in support of these allegations.

(6) petition page 22: "Whether, after a trial, a partial consent judgment can be modified by the district court based upon the lack of consent of a party." In the first place, the

consent judgment was entered prior to, rather than after, trial on the merits. (Bayou Fleet wishes to treat the injunction hearing as the equivalent of a trial, see point 8 below for more detailed discussion). In the second place, the district court did not modify the consent judgment because of a misguided belief that the Clulees' consent was required for entry of judgment, the district judge modified the consent judgment when he learned that Bayou Fleet had used the consent judgment to prevent a state court from holding a hearing to determine whether Bayou Fleet was operating in violation of the zoning code.

(7) petition page 23: "The Clulees' state court lawsuit was a mandamus action which sought to have the state court prevent the Parish Council from voting on whether it should approve the settlement in this case." Absolutely untrue. The Clulees' state court lawsuit is a mandamus action asking the state judge to order parish officials to hold a public hearing to determine whether Bayou Fleet is operating in violation of the zoning code. The Clulees' mandamus action was filed prior to the confection of the consent judgment and a hearing had already been scheduled when the consent judgment was signed. Bayou Fleet used the consent judgment to obtain a postponement of the hearing by using it as the basis for an inaccurate claim of res judicata.

(8) petition page 23: "the appellate court . . . completely disregarded the trial on the merits (which the Clulees participated in) wherein the district court ruled that Bayou Fleet's property had maintained its non-conforming status." There was no trial on the merits as to the zoning issue. Bayou Fleet asked for an injunction against the Parish to prevent enforcement of the ordinances. There was no request for an injunction against the Clulees; at the time of the hearing on

the injunction, Bayou Fleet's only claim against the Clulees was a damage claim which was on the docket for trial by jury (the parties eventually waived the jury). Thus, the trial court held a hearing on the request for injunction against the Parish. The issue was constitutionality of the ordinances, not propriety of Bayou Fleet's zoning. The Clulees' interests were not in play and they attended the hearing but did not offer any evidence.

REASONS FOR DENYING THE WRIT

I. Whether the trial court's fact findings should be set aside because of alleged improper conduct by the trial judge and/or the trial judge's law clerk. (Bayou Fleet's "Questions Presented 5", restated)

Initially, it should be noted that, in its petition for certiorari, Bayou Fleet makes an argument that was not presented to the Fifth Circuit. More specifically, the issue actually presented to, and ruled on by, the Fifth Circuit was formulated by Bayou Fleet as follows:

> The district court violated Bayou Fleet, Inc.'s First Amendment right of access to the court (Bayou Fleet's Issue 1 on appeal, quoted verbatim from Bayou Fleet's original brief on appeal).

The Fifth Circuit summarized Bayou Fleet's argument as follows (234 F.3d at 857, petition for certiorari appendix p. 9):

> Bayou Fleet claims that the law clerk directed the district judge during the course of proceedings to the extent that the law clerk effectively presided over the trial.

In its petition for certiorari, Bayou Fleet has subtly but significantly altered its position. Instead of alleging that the trial judge actually allowed the law clerk to preside, Bayou Fleet now argues that the trial court's fact findings should be rejected because of "an appearance of impropriety." This is not merely a cosmetic change in phrasing: it is a question of substance (whether the judge actually transferred power to the law clerk) versus appearance (whether the judge erred by allowing the law clerk to conduct herself in an inappropriate fashion). Bayou Fleet asked the Fifth Circuit to decide the substantive issue; Bayou Fleet did not ask the Fifth Circuit to rule on whether an "appearance of impropriety" could justify reversal.

Your respondents contend that, because the "appearance of impropriety" issue was not presented to the Fifth Circuit, therefore it is not properly before this Honorable Court.

No matter how the issue is phrased, the practical effect is the same. What Bayou Fleet wants this Honorable Court to do is read the trial record and evaluate the behavior of the trial judge and law clerk for the purpose of determining whether to accept or reject the trial court's fact findings. As per this Honorable Court's Rule 10, issues of this type are not normally a basis for granting a writ of certiorari.

Bayou Fleet has not suggested any unusual considerations which would justify making this case an exception to the general rule.

If this Honorable Court agrees with respondents that the issue is not properly before the Court and/or that the issue is unsuitable for review on certiorari, this disposes of the certiorari petition: the trial court's fact findings provide a basis for the decision which is alternative to, and independent of, the Noerr-Pennington issues.

II. Whether the scope of Noerr-Pennington is the same in Sherman Act and § 1983 cases (Bayou Fleet's "Questions Presented 1-3", restated)

The Fifth Circuit concluded that the scope of Noerr-Pennington is the same in antitrust and § 1983 cases. This is an issue on which reasonable minds can differ. However, the circumstances are such that a grant of certiorari to consider this issue is not appropriate, for three reasons.

First, the issue isn't ripe for review by this Court. In the reported cases in which a § 1983 defendant has relied on Noerr-Pennington, the courts and parties have simply assumed, with little or no analysis, that the scope of Noerr-Pennington is the same in § 1983 and antitrust litigation. *See, e.g., Eaton v. Newport Board of Education*, 975 F.2d 292, 298-299 (6th Cir. 1991); *Tarpley v. Keistler*, 188 F.3d 788 (7th Cir. 1999); *Boulware v. State of Nevada*, 960 F.2d 793, 800-801 (9th Cir. 1992); *Cheminor Drugs, Ltd. v. Ethyl Corporation*, 168 F.3d 119, 122-123 (3d Cir. 1998). As far as your respondents are aware, the Fifth Circuit is the only federal circuit that has undertaken a serious analysis of the issue; to our knowledge, there are no other decisions which either agree with, or conflict with, the decision of the Fifth Circuit.

Thus, our case does not meet the criteria of Rule 10: there is no conflict among lower courts. To the contrary, the law in this area is undeveloped to the point that it is not clear whether a conflict will ever occur.

Bayou Fleet argues that a grant of certiorari is appropriate because, if the Fifth Circuit's decision is allowed to stand, there will be an immediate, dramatic, and very

negative effect on § 1983 litigation. What Bayou Fleet ignores is that the Fifth Circuit's decision does not state a new legal principle. To the contrary, the Fifth Circuit has merely reiterated the conclusion reached by an earlier panel of the same circuit in *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988). The effect of the *Video International Production* decision on § 1983 litigation has been minimal to non-existent. There is no reason to suppose that the current panel's decision will have greater impact, especially since, as examination of the cases cited in the preceding paragraph will show, appellate courts already tend to assume that the scope of Noerr-Pennington is the same in antitrust and civil rights litigation and it does not appear that there have been any significant evil consequences as a result of this assumption.

The second reason why this issue does not justify a grant of certiorari has to do with the particular facts of our case. What Bayou Fleet alleges, reduced to its simplest terms, is that Neal Clulee telephoned a parish council member, Ellis Alexander, and asked Mr. Alexander to propose and vote for two ordinances which negatively impacted Bayou Fleet and which were eventually held to be unconstitutional. Bayou Fleet argues that Mr. Clulee should be liable for his (alleged) actions because Mr. Clulee was (allegedly) motivated by a retaliatory or anti-competitive intention toward Bayou Fleet.

It is well established that a private individual cannot be held liable under § 1983 for advocating legislation which is thereafter enacted and eventually held unconstitutional. *See, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980) and cases cited therein. As far as your respondents are aware, no court has ever held that § 1983

liability may be imposed on a private citizen who advocates passage of a particular piece of legislation subsequently found to be unconstitutional. Indeed, an attempt to impose such liability (based on examination of the private citizens' motives to determine whether the motives are pure or not) would be seriously disruptive of the democratic process.

Therefore, it is quite possible that some court somewhere will eventually disagree with the Fifth Circuit's broadly stated conclusion that the scope of Noerr-Pennington is identical in antitrust and § 1983 cases. However, it is extremely unlikely that any court will ever adopt an interpretation of Noerr-Pennington which would permit imposition of § 1983 liability on a private person in circumstances analogous to those presented (or allegedly presented) here. In practical terms, it is extremely unlikely that a review by this Honorable Court would result in an interpretation of Noerr-Pennington which would require reversal of the Fifth Circuit's decision.

There is one additional point which may be worthy of consideration. This is a case which can easily be decided on the facts: the trial judge found no conspiracy, the appellate court found no basis to set aside the trial court's factual conclusions, therefore (unless this Honorable Court chooses to examine and reject the trial court's fact findings) the Clulees will prevail irrespective of whether Noerr-Pennington is found to apply to their (alleged) actions. In the strict sense, the entire discussion of Noerr-Pennington — at both the trial and appellate level — is dictum.

It is worth asking, what is there about this case that prompted first the trial judge, then the appellate panel, to go far beyond the immediate facts in order to expound at length

on the Noerr-Pennington issues? Your respondents would suggest that the answer can be found by reviewing the history of this litigation. The litigation began as a zoning dispute. Bayou Fleet conducted a commercial operation in a residential neighborhood; residents contacted government officials to complain that this violated the zoning code; the local council member, Mr. Alexander, called for a public hearing to determine whether Bayou Fleet's operation was in violation of the zoning code or not; Bayou Fleet responded by filing a federal lawsuit which resulted in termination of the public debate and indefinite postponement of the public hearing.

This fact pattern demonstrates that 42 U.S.C. § 1983 can be a very powerful antidemocratic weapon. This fact pattern also demonstrates that there are many circumstances in which a prospective § 1983 plaintiff has a powerful economic motive for using § 1983 as an antidemocratic weapon. As far as your respondents can tell, the trial and appellate courts in our case went out of their way to emphasize the availability of Noerr-Pennington protection because they were concerned about the potential for such misuse. This is not a case in which the Fifth Circuit has showed insensitivity to civil rights claimants. The Fifth Circuit's decision was a reasonable one in view of the policy considerations presented.

In sum, the trial judge and three appellate judges have examined Bayou Fleet's Noerr-Pennington arguments. All four judges agreed that Bayou Fleet's contentions are meritless. There is no reason for this Honorable Court to reexamine their decision.

III. Whether the Clulees waived the right to claim Noerr-Pennington protection by failing to plead Noerr-Pennington as an affirmative defense (Bayou Fleet's "Question 4", restated).

There is considerable authority for the proposition that Noerr-Pennington is NOT an affirmative defense and that the plaintiff has the burden to allege and prove conduct outside the protective confines of Noerr-Pennington. *See* the list of authorities cited in footnote 9 of the trial court's opinion on the merits (68 F. Supp. 2d at 743, appendix to petition for certiorari pages 63-64) as well as *Hospital Building Company v. Trustees of the Rex Hospital,* 791 F.2d 288 (4th Cir. 1985) and cases cited therein, and this Honorable Court's opinion in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (in which this Honorable Court repeatedly references the plaintiff's burden to disprove Noerr-Pennington). The Clulees did not raise Noerr-Pennington as an affirmative defense in their answer. They did raise the issue in the pretrial order and in their trial brief (filed approximately a month prior to the date of trial).

Bayou Fleet responded by arguing that Noerr-Pennington was an affirmative defense and the Clulees had waived it by failing to raise it in the answer. Plaintiffs sought to cure any procedural error by filing a belated motion to amend their answer. The trial judge denied the motion to amend as tardy, but considered the merits of Noerr-Pennington because the defense had suffered no prejudice by the non-inclusion of the issue in the Clulees' answer. The Fifth Circuit, concurring with the trial court's analysis, affirmed (but stated, to prevent future confusion, that in the Fifth Circuit's opinion, Noerr-Pennington is an affirmative defense and should be pleaded as such).

Trial courts have wide discretion in matters of this type and the trial court's decision was reasonable.

IV. Whether the trial judge abused his discretion in deciding to modify the consent judgment (Bayou Fleet's "Question 6", restated)

When Bayou Fleet settled with the Parish, the settlement included provisions designed to prevent future challenge to Bayou Fleet's zoning. Bayou Fleet asked the district court to incorporate the settlement into a consent judgment, which the district court agreed to do.

At the time the settlement was reached, the Clulees had already filed a lawsuit seeking a public hearing on the zoning issue and a hearing date had been fixed. Bayou Fleet produced the consent judgment in state court, argued that the consent judgment had a res judicata effect, and obtained an indefinite continuance of the hearing date.

The Clulees asked the district court to modify the consent judgment so that it would be clear that the judgment did not have a res judicata effect as to the Clulees. The district court granted the Clulees' request. The Fifth Circuit found no abuse of discretion. Your respondents would adopt the Fifth Circuit's legal analysis of this issue.

CONCLUSION

For the above and foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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